No. 18-389	
Title:	**Parker Drilling Management Services, Ltd., Petitioner** **v.** **Brian Newton**
Docketed:	September 26, 2018
Linked with 18A20	
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Numbers:	(15-56352)
Decision Date:	February 5, 2018
Rehearing Denied:	April 27, 2018
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Jun 28 2018	Application (18A20) to extend the time to file a petition for a writ of certiorari from July 26, 2018 to August 27, 2018, submitted to Justice Kennedy. **Main Document** **Proof of Service** **Lower Court Orders/Opinions**
Jul 05 2018	Application (18A20) granted by Justice Kennedy extending the time to file until August 27, 2018.
Aug 07 2018	Application (18A20) to extend further the time from August 27, 2018 to September 24, 2018, submitted to The Chief Justice. **Written Request** **Proof of Service**
Aug 08 2018	Application (18A20) granted by The Chief Justice extending the time to file until September 24, 2018.
Sep 24 2018	Petition for a writ of certiorari filed. (Response due October 26, 2018) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Oct 10 2018	Blanket Consent filed by Petitioner, Parker Drilling Management Services, Ltd. **Blanket Consent**
Oct 17 2018	Motion to extend the time to file a response from October 26, 2018 to November 26, 2018, submitted to The Clerk. **Main Document** **Proof of Service**

Oct 19 2018	Motion to extend the time to file a response is granted and the time is extended to and including November 26, 2018.
Oct 26 2018	Brief amici curiae of Freeport-McMoRan Oil & Gas et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Oct 26 2018	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Oct 26 2018	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 26 2018	Brief of respondent Brian Newton in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 11 2018	Reply of petitioner Parker Drilling Management Services, Ltd. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Dec 12 2018	DISTRIBUTED for Conference of 1/4/2019.
Jan 07 2019	DISTRIBUTED for Conference of 1/11/2019.
Jan 11 2019	Petition GRANTED.
Jan 22 2019	Blanket Consent filed by Respondent, Brian Newton **Blanket Consent** **Proof of Service**
Jan 23 2019	Blanket Consent filed by Petitioner, Parker Drilling Management Services, Ltd.. **Blanket Consent**
Feb 11 2019	SET FOR ARGUMENT on Tuesday, April 16, 2019
Feb 20 2019	Joint appendix filed. (Statement of costs received) **Main Document**
Feb 20 2019	Brief of petitioner Parker Drilling Management Services, Ltd. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2019	Brief amicus curiae of United States filed. **Proof of Service** **Main Document**
Feb 27 2019	Brief amicus curiae of Washington Legal Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Feb 27 2019	Brief amicus curiae of Chamber of Commerce of the United States of America filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 27 2019	Brief amici curiae of Freeport-McMoRan Oil & Gas LLC, et al. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 20 2019	CIRCULATED
Mar 21 2019	Record requested from the U.S.C.A. 9th Circuit.
Mar 22 2019	Brief of respondent Brian Newton filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Mar 27 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. **Proof of Service** **Main Document**
Mar 29 2019	Brief amicus curiae of California Applicants' Attorneys Association ("CAAA") filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 09 2019	Reply of petitioner Parker Drilling Management Services, Ltd. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Apr 12 2019	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 16 2019	Argued. For petitioner: Paul D. Clement, Washington, D. C.; and Christopher G. Michel, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: David C. Frederick, Washington, D. C.
Jun 10 2019	Judgment VACATED and case REMANDED. Thomas, J., delivered the **opinion** for a unanimous Court.

NAME	**ADDRESS**	**PHONE**
Attorneys for Petitioner		
Paul D. Clement Counsel of Record	Kirkland & Ellis LLP 655 Fifteenth Street, NW Washington, DC 20005 paul.clement@kirkland.com	(202) 879-5000
Party name: Parker Drilling Management Services, Ltd.		
Attorneys for Respondent		

David C. Frederick Counsel of Record	Kellogg, Hansen, Todd, Figel & Frederick 1615 M Street, NW, Suite 400 Washington, DC 20036-3209 dfrederick@kellogghansen.com	202-326-7900

Party name: Brian Newton

Michael Anthony Strauss	Strauss & Strauss, APC 121 N. Fir St., Ste F Ventura, CA 93001 mike@strausslawyers.com	8056416600

Party name: Brian Newton

Other

Noel J. Francisco Counsel of Record	Solicitor General United States Department of Justice 950 Pennsylvania Avenue, NW Washington, DC 20530-0001 SupremeCtBriefs@USDOJ.gov	202-514-2217

Party name: United States

Hyland Hunt Counsel of Record	Deutsch Hunt PLLC 300 New Jersey Ave., NW Suite 900 Washington, DC 20001 hhunt@deutschhunt.com	202-868-6915

Party name: Chamber of Commerce of the United States of America

Jeremy Charles Marwell Counsel of Record	Vinson & Elkins LLP 2200 Pennsylvania Avenue, NW, Suite 500W Washington, DC 20037 jmarwell@velaw.com	202-639-6500

Party name: Freeport-McMoRan Oil & Gas LLC, et al.

Richard A. Samp Counsel of Record	Washington Legal Foundation 2009 Massachusetts Ave., N.W. Washington, DC 20036-0000 rsamp@wlf.org	202-588-0302

Party name: Washington Legal Foundation

John J. Korzen Counsel of Record	WAKE FOREST UNIVERSITY SCHOOL OF LAW APPELLATE ADVOCACY CLINIC Post Office Box 7206 Winston-Salem, NC 27109 korzenjj@wfu.edu	3367585832

Party name: CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION ("CAAA")

No. ____

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTICRARI

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

September 24, 2018

QUESTION PRESENTED

In the Outer Continental Shelf Lands Act ("OCSLA"), Congress declared federal law to be the exclusive source of law on the Outer Continental Shelf ("OCS"). To fill the gaps in the coverage of federal law, Congress provided that the law of the adjacent state would be borrowed as federal law, to the extent that such state law is "applicable" and "not inconsistent with" existing federal law. Consistent with this Court's decisions, the Fifth Circuit has long held that state law is not borrowed as surrogate federal law under OCSLA unless there is a gap in federal law, as with a garden-variety contract claim. In the decision below, the Ninth Circuit expressly disagreed with the Fifth Circuit and held that state law should be borrowed as federal law governing the OCS whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, regardless of whether there is a gap in federal law. It thus held that California's wage-and-hour laws apply to claims filed by workers on drilling platforms on the OCS, even though the Fair Labor Standards Act already provides a comprehensive set of federal rights and remedies. The result is wholly unanticipated and potentially massive liability for OCS operators that fully complied with the FLSA.

The question presented is:

Whether, under OCSLA, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

PARTIES TO THE PROCEEDING

Defendant-appellee below, who is the petitioner in this Court, is Parker Drilling Management Services, Ltd.

Plaintiff-appellant below, who is the respondent in this Court, is Brian Newton.

CORPORATE DISCLOSURE STATEMENT

Parker Drilling Management Services, Ltd.'s parent company and sole member is wholly owned by Parker Drilling Company, which is a publicly traded company.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES vi
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 5
JURISDICTION 5
STATUTORY PROVISIONS INVOLVED 5
STATEMENT OF THE CASE 6
A. The Outer Continental Shelf Lands Act 6
B. The Fair Labor Standards Act 8
C. Factual & Procedural Background 9
REASONS FOR GRANTING THE PETITION 11
I. The Ninth Circuit's Decision Openly Conflicts With Fifth Circuit Precedent That Is Also Binding In The Eleventh Circuit 14
II. The Ninth Circuit's Decision Creates An Intolerable Split, Undermines Reliance Interests, And Invites Strategic Behavior By States 20
III. The Ninth Circuit's Decision Is Incorrect 22
A. State Law Is Applicable Under OCSLA Only When There Are Gaps in the Coverage of Federal Law Necessary For State Law to Fill 23
B. California's Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes 32

CONCLUSION 35

APPENDIX

Appendix A

Opinion, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Feb. 5, 2018) App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Apr. 27, 2018) App-42

Appendix C

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (May 16, 2018) App-44

Appendix D

In Chambers Order, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Inc.*, No. 15-cv-02517-RGK-AGR (Aug. 10, 2015) App-46

Appendix E

Relevant Statutory Provisions App-61

43 U.S.C. § 1332(1) App-61

43 U.S.C. § 1333(a)(1)-(2)(A) App-61

TABLE OF AUTHORITIES

Cases

ACE Am. Ins. Co. v. M-I, L.L.C.,
699 F.3d 826 (5th Cir. 2012) 19

Amber Res. Co. v. United States,
538 F.3d 1358 (Fed. Cir. 2008) 6

Barrentine v. Arkansas-Best Freight Sys., Inc.,
450 U.S. 728 (1981) 8, 30

Bartholomew v. CNG Producing Co.,
862 F.2d 555 (5th Cir. 1989) 17

Brigham v. Eugene Water & Elec. Bd.,
357 F.3d 931 (9th Cir. 2004) 8

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 2, 25

Christopher v. SmithKline Beecham,
567 U.S. 142 (2012) 5, 21, 22

Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) ..... *passim*

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 4, 22

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013) 31

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) ..... *passim*

In re Deepwater Horizon,
745 F.3d 157 (5th Cir. 2014) 19

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 34

Integrity Staffing Sols. v. Busk,
135 S. Ct. 513 (2014) 5, 22

Jacobs v. Nat'l Drug Intelligence Ctr.,
548 F.3d 375 (5th Cir. 2008) 18

Leo Sheep Co. v. United States,
440 U.S. 668 (1979) 29

Leocal v. Ashcroft,
543 U.S. 1 (2004) 28

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 17

Maryland v. Louisiana,
451 U.S. 725 (1981) 26

Mendiola v. CPS Sec. Sols., Inc.,
340 P.3d 355 (Cal. 2015) 3, 9, 21

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 16, 17, 31, 32

Ransom v. FIA Card Servs.,
562 U.S. 61 (2011) 27, 29

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352 (1969) ..... *passim*

Rousseau v. Teledyne Movible Offshore, Inc.,
805 F.2d 1245 (5th Cir. 1986) 9

Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 6, 24

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 8

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) 26, 27

Union Tex. Petroleum Corp. v. PLT Eng'g, Inc.,
895 F.2d 1043 (5th Cir. 1990) 18, 19

United States v. California,
332 U.S. 19 (1947) 6, 23

United States v. Darby,
312 U.S. 100 (1941) 8, 30

W.V. Univ. Hosps., Inc. v. Casey,
499 U.S. 83 (1991) 28

Whitman v. Am. Trucking Ass'ns.,
531 U.S. 457 (2001) 28

Williams v. Brinderson Constructors Inc.,
2015 WL 4747892 (C.D. Cal. Aug. 11, 2015) 17

Statutes

29 U.S.C. §211(c) 31

29 U.S.C. §216(b) 31

29 U.S.C. §218(a) 11, 33

43 U.S.C. §1331(a) 6

43 U.S.C. §1333(a)(1) 1, 24

43 U.S.C. §1333(a)(2)(A) ..... *passim*

43 U.S.C. §1333(a)(3) 7

Rule and Regulations

S. Ct. R. 10(a) 12

29 C.F.R. §§785.14-785.22 8

29 C.F.R. §785.19 31

29 C.F.R. §785.22 21

29 C.F.R. §785.23 8

Other Authorities

99 Cong. Rec. 6963 (1953) 30
99 Cong. Rec. 7164 (1953) 30
99 Cong. Rec. 7257 (1953) 30
S. Rep. No. 83-411 (1953) 29

PETITION FOR WRIT OF CERTIORARI

The federal government has exclusive control and sovereignty over the Outer Continental Shelf ("OCS"). Congress, anticipating extensive mineral-resource development on the OCS, enacted the Outer Continental Shelf Lands Act ("OCSLA") to define a body of law applicable to drilling platforms affixed to the OCS, on which thousands of people live and work for extended periods of time. After considering and rejecting the wholesale application of state law or maritime law, Congress made federal law the exclusive source of law on the OCS. 43 U.S.C. §1333(a)(1). Thus, all law on the OCS is federal law, and no state law applies of its own force. Congress recognized, however, that federal law, because of its interstitial nature, would not address every issue that arose on the OCS. Accordingly, to fill gaps in federal law, Congress declared that the laws of the adjacent state would be borrowed as the applicable federal law governing the OCS to the extent those laws are "applicable" and "not inconsistent with" preexisting federal law. 43 U.S.C. §1333(a)(2)(A).

In a trilogy of cases interpreting OCSLA, this Court recognized that state law never applies of its own force on the OCS but can sometimes serve as surrogate federal law to fill gaps in the coverage of federal law. In the first of these cases, *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), this Court explained that "state law [is] used only to supplement federal law," *id.* at 358, and held that state law supplied the federal rule of decision for the plaintiffs' wrongful-death actions only because there was a gap in federal law—in other words, because the

"inapplicability of [federal law] removes any obstacle to the application of state law by incorporation as federal law," *id.* at 366. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), this Court again explained that Congress incorporated state law standards "for filling in the gaps in federal law." *Id.* at 104-05. And in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), this Court reiterated that state law's function under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." *Id.* at 480. State law supplied the content of federal law in all three cases, but only because there was no other federal law to apply.

Consistent with those cases, the Fifth Circuit held early on that state law is "applicable" as federal law under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). In *Continental Oil*, the Fifth Circuit affirmed dismissal of a lawsuit filed under Louisiana law, explaining that federal law already provided the plaintiffs with a complete set of "substantive rights and remedies" to govern their dispute. *Id.* Because there was "no void" and "no gaps" in the coverage of federal law, the Louisiana statute did not apply as surrogate federal law. *Id.* at 1036, 1040. As a binding decision of the old Fifth Circuit, *Continental Oil* governs the entire Gulf Coast.

In light of *Continental Oil* and this Court's cases, employers and employees have long structured their relationships on the understanding that state wage-and-hour laws do not apply on the OCS because the Fair Labor Standards Act ("FLSA") is a comprehensive federal scheme that leaves no gap for

state law to fill. But after the California Supreme Court issued a worker-friendly decision in *Mendiola v. CPS Security Solutions, Inc.*, 340 P.3d 355 (Cal. 2015), employees on the OCS filed a spate of class-action lawsuits, arguing that California's wage-and-hour laws have applied all along and under California law OCS operators owe compensation not just for hours spent working, but for all time spent on the platform, including time spent sleeping and otherwise not working. District courts uniformly rejected that argument, relying on *Continental Oil*.

In the decision below, the Ninth Circuit disagreed with the Fifth Circuit and every other court to consider the issue, holding that state law extends to the OCS regardless of whether there is a gap in federal law. The Ninth Circuit expressly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if needed "to fill a significant void or gap" in federal law. App.2. It instead concluded that state law is "applicable" on the OCS whenever it "pertain[s] to the subject matter at hand." App.21. Applying that expansive standard, the Ninth Circuit held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to respondent's wage-and-hour claims, and are "not inconsistent" with federal law because the FLSA contains a savings clause that would preserve state wage-and-hour laws under preemption principles. App.35-39. In recognition of the circuit split and far-reaching consequences of its decision, the Ninth Circuit stayed the mandate pending a petition for certiorari.

Certiorari is plainly warranted to resolve this acknowledged split of authority. Indeed, the Ninth

Circuit's decision not only opens a split among the circuits with jurisdiction over almost all drilling operations on the OCS, but its interpretation badly misconstrues the text, history, and purpose of OCSLA. As every court to consider the issue has recognized until now, Congress intended for state law to supply the applicable federal rule on the OCS only to fill gaps in federal law. Where, as here, a comprehensive set of federal rights and remedies already governs a dispute, importing different state-law standards turns OCSLA on its head by giving primacy to state law instead of the federal law that Congress deemed exclusive.

The Ninth Circuit's decision injects uncertainty into what had been a settled area of the law, and it will have serious consequences for companies on the OCS. Those companies and their employees have negotiated mutually beneficial compensation plans that account for the distinct circumstances of offshore work, in good-faith reliance on decades of precedent making clear that the FLSA is the exclusive source of wage-and-hour law on the OCS. If allowed to stand, the Ninth Circuit's decision would require a wholesale restructuring of the way those employees are compensated, would threaten massive retroactive liability, and would allow states seeking to discourage offshore energy development to enact divisive laws that would frustrate Congress' plain intent.

This Court has repeatedly reversed Ninth Circuit decisions imposing FLSA liability on employers who have done nothing more than pay workers in conformity with long-settled industry practice. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018); *Integrity Staffing Sols. v. Busk*, 135 S. Ct.

513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). The decision below does those earlier Ninth Circuit decisions one better by unsettling expectations and threatening massive liability on employers who have indisputably complied with the FLSA. This Court should grant certiorari to restore uniformity to this important area of the law and correct the Ninth Circuit's deeply flawed interpretation of OCSLA.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 881 F.3d 1078 and reproduced at App.1-41. The district court's order granting judgment on the pleadings is available at 2015 WL 12645746 and reproduced at App.46-60.

JURISDICTION

The Ninth Circuit issued its opinion on February 5, 2018. On April 27, 2018, the Ninth Circuit denied a petition for rehearing en banc, but the panel issued an amended opinion and, on May 16, 2018, stayed its mandate pending certiorari. On July 5, 2018, Justice Kennedy extended the time for filing this petition to August 27, 2018. On August 8, 2018, Chief Justice Roberts extended the time for filing this petition to September 24, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of OCSLA are set forth in the appendix.

STATEMENT OF THE CASE

A. The Outer Continental Shelf Lands Act

The OCS consists of all submerged coastal lands that are within the United States' jurisdiction but outside the territorial jurisdiction of the individual states. *See* App.5; 43 U.S.C. §1331(a). Along the coast, state control over offshore lands extends three nautical miles outward. All submerged lands seaward from there and within the United States' jurisdiction under international law (ordinarily, submerged lands within 200 nautical miles of the shore) constitute the OCS and fall under exclusive federal jurisdiction. *See Amber Res. Co. v. United States*, 538 F.3d 1358, 1362 (Fed. Cir. 2008).

OCSLA grew out of a dispute "between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). After this Court ruled that the federal government had exclusive jurisdiction over the OCS, *see United States v. California*, 332 U.S. 19, 38-39 (1947), Congress enacted OCSLA and "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit," *Shell Oil*, 488 U.S. at 27.

OCSLA's primary purpose was to "define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the [OCS]." *Rodrigue*, 395 U.S. at 355. Congress initially considered treating drilling platforms like vessels and applying maritime law, but ultimately concluded "that maritime law was inapposite to these fixed

structures." *Id.* at 363. Congress also rejected the direct application of the law of the adjacent state, deciding against "the notion of supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036. Congress instead declared the OCS a federal enclave governed exclusively by federal law: "The Constitution and laws ... of the United States are extended to the [OCS] ... to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area."). Put succinctly, all law on the OCS is federal law.

At the same time, Congress recognized that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems" that could arise on drilling platforms. *Rodrigue*, 395 U.S. at 357. Accordingly, to fill "gaps in the federal law," *id.*, Congress borrowed the laws of the adjacent state as surrogate federal law on the OCS, but only to the extent those laws "are applicable and not inconsistent with this subchapter or with other Federal laws and regulations." 43 U.S.C. §1333(a)(2)(A). To ensure that this limited incorporation of state-law standards as federal law would not erode federal control over the OCS, Congress clarified that OCSLA's choice-of-law provisions "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [OCS]." 43 U.S.C. §1333(a)(3). In short, no state law operates of its own force on the OCS, and states have no direct sovereignty over the OCS.

This Court has described the resulting choice-of-law scheme as follows: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore*, 453 U.S. at 480.

B. The Fair Labor Standards Act

The FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that protects "all covered workers from substandard wages and oppressive working hours," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Among the topics the FLSA and its implementing regulations address is whether employees must be compensated for time spent on the employer's premises but off-duty, including time spent sleeping. For example, federal regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. §785.23; *see id.* §§785.14-785.22. While there is no "legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time," *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944), courts have developed a substantial body of case law to determine whether such hours are compensable. *See, e.g.*, *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940-41 (9th Cir. 2004) (holding sleep time non-compensable for employees residing on their employer's premises); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 (5th Cir.

1986) (holding off-duty hours non-compensable for employees residing on employer's barges).

C. Factual & Procedural Background

Respondent Brian Newton worked from January 2013 to January 2015 on Parker's drilling platforms, which are attached to the OCS off the California coast. App.2. As is standard for employees on drilling platforms, Newton worked fourteen-day shifts on the platform. App.3. During each shift, he remained on the platform at all times, spending 12 hours on duty and 12 hours off duty; other crew members maintained the opposite schedule, allowing the rig to operate 24 hours a day. App.3. For working that atypical schedule, Newton, like most employees on drilling rigs, earned "well above the state and federal minimum wage," including "premium rates for overtime hours." App.20.

In January 2015, the California Supreme Court held in *Mendiola* that, unlike the FLSA, California's wage-and-hour laws entitled workers to "compensation for all on-call hours spent at their assigned worksites." 340 P.3d at 357. Barely one month later, Newton filed a putative class action in California state court, alleging that California's wage-and-hour laws required Parker to pay him not only for the 12 hours he actually worked each day on the platform, but also for the 12 hours he spent off-duty, including time spent sleeping. App.3. Parker removed the action to federal court and moved for judgment on the pleadings, arguing that OCSLA does not adopt California's wage-and-hour laws as surrogate federal law because there is no gap in federal law for state law to fill. App.4.

The district court granted Parker's motion. Relying on the Fifth Circuit's *Continental Oil* line of cases, the district court explained that "under OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." App.51 (quoting *Cont'l Oil*, 417 F.2d at 1036). Because the FLSA is a comprehensive federal wage-and-hour scheme, the court observed, "there are no significant voids or gaps" in federal law, and therefore "it is not necessary to apply the law of the adjacent state." App.52.

The Ninth Circuit, in a decision by Judge Christen and joined by Judges Paez and Berzon, reversed. Expressly rejecting *Continental Oil*, the court held that "the absence of federal law is not ... a prerequisite to adopting state law as surrogate federal law under [OCSLA]." App.2. The court acknowledged that the Fifth Circuit interpreted OCSLA and this Court's cases as "requir[ing] that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The court likewise acknowledged that every district court in the Ninth Circuit to consider the issue had followed the Fifth Circuit's lead and "concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill." App.20 n.13. The court nonetheless disagreed with that previously unanimous interpretation: "We ... reject the proposition that 'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (citations omitted). Instead, the court held, state laws are "applicable" under

OCSLA whenever they "pertain[] to the subject matter at hand." App.21.

The court next addressed the meaning of "not inconsistent with." 43 U.S.C. §1333(a)(2)(A). The court held that California's wage-and-hour laws are "not inconsistent with" the FLSA because the FLSA's savings clause "explicitly permits more protective state wage and hour laws." App.36; *see* 29 U.S.C. §218(a). Having concluded that "California's minimum wage and maximum hours worked provisions are applicable and not inconsistent with the FLSA," the court vacated the district court's judgment and remanded for further proceedings. App.39 (citation omitted).

The court denied a petition for *en banc* review, but the panel amended its opinion to direct the district court to consider whether its holding "should be applied retrospectively." App.43. The court granted petitioner's motion to stay the mandate pending the filing of a petition for certiorari. App.44-45.

REASONS FOR GRANTING THE PETITION

This case presents an acknowledged split of authority among the circuits with jurisdiction over almost all OCSLA cases. In a clear departure from Fifth Circuit precedent that is sufficiently longstanding that it also binds the Eleventh Circuit, the Ninth Circuit held that OCSLA adopts state law as surrogate federal law on the OCS even when federal law already provides a comprehensive set of rights and remedies to govern the dispute such that there is no gap in federal law to fill. The court readily acknowledged that its decision conflicts with the Fifth Circuit's *Continental Oil* decision, but it expressly

"reject[ed]" that approach and instead adopted a standard that the Fifth Circuit had expressly rejected fifty years earlier. The Ninth Circuit's suggestion that the Fifth Circuit might no longer adhere to *Continental Oil* is readily disproved, as even the Ninth Circuit itself ultimately seemed to recognize. And *Continental Oil* continues to bind the Eleventh Circuit in all events. Certiorari is thus warranted because the decision below conflicts with "the decision of another United States court of appeals on the same important matter." S. Ct. R. 10(a).

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS magnify the consequences here. Almost all litigation concerning OCSLA occurs within the confines of the old Fifth and current Ninth Circuits, and companies with operations offshore in both regions may be subject to Ninth and Fifth Circuit precedents simultaneously, making uniformity particularly critical. The decision below also disrupts longstanding relationships among employers and employees on the OCS, who have negotiated mutually beneficial compensation plans in good-faith reliance on the shared understanding that the FLSA was the exclusive source of wage-and-hour law on the OCS. The decision below would require a wholesale reworking of those relationships, and in the meantime threatens massive retroactive liability on companies who fully complied with the FLSA. This Court has not hesitated to intervene in previous cases where the Ninth Circuit exposed employers to massive, unexpected liability for merely following seemingly settled law, and it should do so again here.

Certiorari is all the more critical because the decision below is wrong. The text, history, and purpose of OCSLA's choice-of-law provisions—along with this Court's cases applying them—make clear that state law's only role under OCSLA is to provide a federal rule of decision "to fill federal voids." *Rodrigue*, 395 U.S. at 358. The Ninth Circuit reached a contrary conclusion only by ignoring this Court's cases, employing deeply flawed statutory interpretation, and refusing to engage with the historical evidence, all of which demonstrates that state law becomes "applicable" as federal law only when there is no other federal law to apply. Here, because the FLSA is a comprehensive federal scheme that provides rights and remedies with respect to each of Newton's allegations, there is no gap in the coverage of federal law, and thus no need to adopt state law as surrogate federal law.

Even if state law could be deemed "applicable" under OCSLA without a gap in federal law, the decision below would still be wrong because the state wage-and-hour laws Newton invokes are "inconsistent with" the FLSA for OCSLA purposes. The Ninth Circuit proceeded as if the "inconsistency" inquiry under OCSLA is little different from conflict preemption. But that ignores the most basic aspect of OCSLA—namely, that Congress reaffirmed exclusive federal sovereignty over the OCS and decided to make *all* law applicable on the OCS *federal* law. Thus, no state law applies on the OCS as a result of the state's residual sovereignty. While it makes perfect sense to respect state sovereignty and demand an affirmative conflict between state and federal law before finding conflict preemption, that demanding standard is

wholly misplaced on the OCS, where all law is federal and the only question is whether Congress wanted overlapping and inconsistent federal standards.

The Ninth Circuit's error is evident in its reliance on the FLSA's savings clause, which saves state and local wage laws. Congress' federalism-friendly decision not to displace state and local laws in Fresno says nothing about whether Congress would want to have two federal laws, each prescribing a different minimum wage, governing the exclusive federal enclave that is the OCS. Yet that is the counterintuitive result ushered in by the decision below. Once inconsistency is judged without reference to inapposite preemption-like principles, the inconsistency between the FLSA and a federal wage-and-hour regime borrowed from California is obvious. One federal law tells employers to pay $7.25 per hour; the other federal law tells them to pay $11.00 per hour. One federal law allows them to pay for hours actually worked; the other federal law demands payment for time spent sleeping on the premises. While compliance with both federal laws is possible (by always complying with the more burdensome requirement), no rational Congress—and certainly not the Congress that passed OCSLA with a modest gap-filling mission in mind—would impose such inconsistency.

I. The Ninth Circuit's Decision Openly Conflicts With Fifth Circuit Precedent That Is Also Binding In The Eleventh Circuit.

In a departure from almost fifty years of Fifth Circuit precedent and industry reliance, the Ninth Circuit held that state law can apply on the OCS even

when there are no gaps in the coverage of federal law. The court readily acknowledged that its interpretation of OCSLA conflicted with the Fifth Circuit's, stating that it "reject[ed]" *Continental Oil*'s holding that "'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." App.2 (quoting *Cont'l Oil*, 417 F.2d at 1036, and 43 U.S.C. §1333(a)(2)(A)). And because *Continental Oil* predated the division of the Fifth Circuit, *Continental Oil* is binding precedent in the Eleventh Circuit and governs the entire Gulf Coast. This Court's review is needed to resolve this circuit split among the circuits with jurisdiction over virtually all drilling operations on the OCS.

A. In *Continental Oil*, the Fifth Circuit held that state law is not "applicable" as surrogate federal law unless it is needed to fill a gap in the coverage of federal law. The dispute in *Continental Oil* arose from a collision between a ship and a drilling platform affixed to the OCS. 417 F.2d at 1031. The owner of the drilling platform sued the shipowner's insurer, attempting to invoke a Louisiana statute that allowed direct actions against an insurer without first obtaining a judgment against the insured. *Id.* at 1031-32. The district court dismissed the lawsuit and the Fifth Circuit affirmed, holding that state law is "applicable" under OCSLA only when it is needed "to fill a significant void or gap" in federal law. *Id.* at 1036. Because federal law already provided "substantive rights and remedies" for injuries arising from the collision, "[t]here is no void, there are no gaps." *Id.* Accordingly, the Louisiana statute did not apply. *Id.* at 1040.

In reaching that conclusion, the Fifth Circuit relied extensively on *Rodrigue*, 395 U.S. 352; *see infra*. The "recurring theme" of *Rodrigue*, according to the Fifth Circuit, was that Congress' "deliberate choice of federal law ... requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The Fifth Circuit highlighted *Rodrigue*'s repeated references to OCSLA's use of state law to "supplement[] gaps" or to "fill federal voids." *Id.* at 1036; *see, e.g.*, *Rodrigue*, 395 U.S. at 358 ("This language makes it clear that state law could be used to fill federal voids.").

The *Continental Oil* court expressly rejected the plaintiff's argument that "the term 'applicable'" means only that the relevant state law is "applicable to the subject matter in question." 417 F.2d at 1035. That overly broad interpretation, the court explained, "imputes to Congress the purpose generally to export the whole body of adjacent [state] law onto the" OCS. *Id.* at 1035. Such a result "is hardly in keeping with" Congress' "reject[ion]" in OCSLA of "the notion of supremacy of state law administered by state agencies." *Id.* at 1036.

The Fifth Circuit has continued to apply the *Continental Oil* test in cases presenting choice-of-law questions on the OCS. In *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), for example, it held that a Louisiana statute did not apply to a lawsuit between two employees on an offshore drilling rig. The court reaffirmed that state law was not "applicable" under OCSLA unless it was "necessary to fill some gap in federal law," which was not the case because the Longshore and Harbor Workers' Compensation Act

provided a federal remedy and thus left "no gap—not even a tiny one." *Id.* at 589. Likewise, in *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), a Louisiana retaliatory discharge statute did not apply on the OCS because "Congress provided a specific statutory provision (33 U.S.C. §948a) to address retaliatory discharges." *Id.* at 509; *see also Bartholomew v. CNG Producing Co.*, 862 F.2d 555, 557 (5th Cir. 1989) (holding that state law does not apply to apportionment of attorney's fees because "there is applicable federal law").

Before the Ninth Circuit's decision in this case, several district courts within the Ninth Circuit had followed *Continental Oil* in holding that state law is applicable as surrogate federal law on the OCS only when it is needed "to fill gaps in federal law." *Williams v. Brinderson Constructors Inc.*, 2015 WL 4747892, at *4 (C.D. Cal. Aug. 11, 2015); *see* App.20 n.13 (collecting cases). Not one district court held otherwise.

B. In this case, the Ninth Circuit expressly disagreed with the Fifth Circuit's *Continental Oil* line of cases, stating: "[W]e are not convinced that state law applies as surrogate federal law on the OCS only if 'necess[ary],' *Cont'l Oil*, 417 F.2d at 1036, in the sense that there is no existing federal law on the subject." App.26. The court explicitly "reject[ed]" the Fifth Circuit's rule that state law is "applicable" under OCSLA only if it is necessary "to fill a significant void or gap." App.2. Then, exacerbating the conflict, it adopted a standard that the Fifth Circuit had specifically rejected in *Continental Oil*. Whereas the Fifth Circuit declined to read the term "applicable" as

meaning "applicable to the subject matter in question," *Cont'l Oil*, 417 F.2d at 1035, the Ninth Circuit embraced exactly that standard, holding that state laws are "applicable" whenever they "pertain[] to the subject matter at hand." App.21. Applying that expansive standard, the panel held that California's wage-and-hour laws are "applicable" on the OCS because they pertain to the subject matter of Newton's claim. App.35-39.

While it openly acknowledged its disagreement with *Continental Oil*, the Ninth Circuit tried to soften that blow by suggesting that the Fifth Circuit might have moved away from *Continental Oil*. In particular, the Ninth Circuit stated that it was "unclear" whether a test set forth in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) ("*PLT*"), "has superseded the *Continental Oil* test in the Fifth Circuit." App.19. That suggestion is simply wrong. The Fifth Circuit's *PLT* decision was written by the same judge as *Continental Oil* and contains not a whiff of disapproval of that jurist's earlier decision—and under the Fifth Circuit's rule of orderliness, *see Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008), even a panel less sensitive to consistency with its earlier work product could not have "superseded" *Continental Oil*. Moreover, nothing in *PLT* could affect *Continental Oil*'s status as binding law in the Eleventh Circuit.

In reality, and as the Ninth Circuit ultimately recognized, "the *Continental Oil* test" is "a precursor to the *PLT* test"; the latter test addresses the subsequent determination of what type of law fills the gap once the logically anterior determination that

"there is a significant gap or void in federal law" has already been made. App.19. The dispute in *PLT* was a standard contract dispute; the absence of an on-point federal statute went without saying. *See* 895 F.2d at 1046. The only question was whether the gap in federal law should be filled by state law or, instead, by general maritime law. The Fifth Circuit created the so-called "*PLT* test" to answer that question, holding that maritime law would fill the gap if it would "apply of its own force" in the absence of OCSLA; otherwise, state law would supply the federal rule of decision if it was "not inconsistent with" federal law. *Id.* at 1047. Thus, *PLT* only confirms the Fifth Circuit's view that Congress intended for state law to apply only "to fill in the gaps in the federal law." *Id.* at 1052; *see also In re Deepwater Horizon*, 745 F.3d 157, 166 & n.10 (5th Cir. 2014) (calling the *PLT* test a "misfit" in light of federal statutes already "regulating water pollution and oil pollution").[1]

In sum, the decision below expressly rejects longstanding Fifth Circuit precedent, which also governs the Eleventh Circuit, holding that state law is "applicable" as surrogate federal law under OCSLA only if state law is "necess[ary] to fill a significant void or gap" in the coverage of federal law. *Cont'l Oil*, 417 F.2d at 1036. Instead, in the Ninth Circuit, state law is "applicable" under OCSLA whenever it "pertain[s] to the subject matter at hand," App.21, even when it

---

[1] In every case in which the Fifth Circuit has applied the *PLT* test, the only potentially applicable sources of law were general maritime law and state law—*i.e.*, there was an unquestioned gap in federal law. *See, e.g.*, *ACE Am. Ins. Co. v. M-I, L.L.C.*, 699 F.3d 826, 832 (5th Cir. 2012) (contract dispute).

is not needed to fill a gap in federal law. The Ninth Circuit's explicit departure from the Fifth Circuit's longstanding view—and its adoption of the very standard that the Fifth Circuit has rejected—creates a circuit split that clearly warrants this Court's review.

II. The Ninth Circuit's Decision Creates An Intolerable Split, Undermines Reliance Interests, And Invites Strategic Behavior By States.

A circuit split over the meaning of a federal statute would be undesirable in any circumstance, but the practical realities of the OCS and oil and gas operations there exacerbate the consequences and underscore the need for certiorari here. The Fifth, Eleventh, and Ninth Circuits have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, off the Gulf Coast and the Pacific Coast (including Alaska). As a result, almost all litigation concerning OCSLA occurs in these circuits, rendering the split here both unlikely to benefit from further percolation and particularly intolerable. Making matters worse, for companies with operations offshore in both regions, enterprise-wide policies and employer-employee relationships may be subject to Ninth and Fifth Circuit precedent simultaneously, making uniformity regarding OCSLA's choice-of-law rules particularly important.

Certiorari is also critical because the Ninth Circuit's decision disrupts longstanding employer-employee relationships. Employers and employees on the OCS, often through collective bargaining, have implemented mutually beneficial compensation and

benefit systems based around the shared understanding that the FLSA is the exclusive source of wage-and-hour law on the OCS. For example, many employers and employees have agreed to exclude sleep time from hours worked, as expressly permitted by federal law. *See* 29 C.F.R. §785.22. Under California law, however, such agreements are ineffective in all but a few select industries. *See Mendiola*, 340 P.3d at 365-66. The Ninth Circuit's holding would thus force employers and employees into compensation plans that differ from agreements they voluntarily negotiated, which—unlike California's wage-and-hour laws—were specifically tailored to the distinctive circumstances of work on offshore drilling platforms.

This Court has not looked favorably on analogous attempts by plaintiffs to use novel theories of wage-and-hour liability to upset long-settled industry practices. In the FLSA context, for example, the Court has explained that it may be "possible for an entire industry to be in violation of the [FLSA] for a long time" with no one noticing, but the "more plausible hypothesis" is that the industry's practices simply were not unlawful. *Christopher*, 567 U.S. at 158. Newton and the class he represents do not seek to impose liability under the FLSA, but the effect on settled expectations and industries practices is the same. In fact, this lawsuit is even more problematic, as it threatens massive liability against employers who undisputedly *complied with* the FLSA on platforms governed exclusively by federal law. Those employers, who relied for fifty years on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS, have now been blindsided by the Ninth Circuit's

holding that state wage-and-hour standards also apply as overlapping federal law and have done so all along. This Court has repeatedly intervened to address (and ultimately reject) similar efforts by the Ninth Circuit to expose settled industry practices to massive, unexpected liability, *see Encino Motorcars*, 138 S. Ct. 1134; *Integrity Staffing*, 135 S. Ct. 513; *Christopher*, 567 U.S. at 142, and should do so again here.

Finally, the Ninth Circuit's decision invites strategic behavior by States that are hostile to offshore drilling. Because state laws presumptively apply on the OCS under the decision below, States may attempt to enact targeted laws that increase the difficulty and cost of OCS operations, deterring activity the federal government seeks to encourage. That is plainly inconsistent with Congress' basic judgment in OCSLA to make the OCS an enclave of exclusive federal jurisdiction where only federal law governs. Along the same lines, the decision below encourages opportunistic plaintiffs to file copycat suits addressed to the OCS every time California broadens its wage-and-hour protections. This Court should grant certiorari to restore uniformity to this important area of the law and arrest the far-reaching consequences of the decision below.

III. The Ninth Circuit's Decision Is Incorrect.

Certiorari is all the more critical because the Ninth Circuit's decision is wrong. By holding that state law can apply on the OCS even absent a gap in federal law, the Ninth Circuit misinterpreted OCSLA and this Court's precedent, both of which make clear that state law's only role is "to fill federal voids."

Rodrigue, 395 U.S. at 358. Moreover, by holding that California's wage-and-hour laws are "not inconsistent" with the FLSA because of the FLSA's savings clause, the Ninth Circuit failed to recognize that OCSLA incorporates state law *as federal law*, making preemption principles and the FLSA's savings clause's carve-out for state law entirely inapt.

A. State Law Is Applicable Under OCSLA Only When There Are Gaps in the Coverage of Federal Law Necessary For State Law to Fill.

1. Congress enacted OCSLA in the wake of a protracted dispute between the federal government and the States over sovereignty and ownership of coastal submerged lands. After this Court held that all submerged lands belong exclusively to the federal government, *United States v. California*, 332 U.S. at 38-39, Congress crafted a compromise to quell the "deep political and emotional currents centered around the clash between national sovereignty and states' rights," *Cont'l Oil*, 417 F.2d at 1036: It ceded all federal interest in submerged lands within three miles of the coast, 43 U.S.C. §§1301-1315, but affirmed its absolute sovereignty and control over the OCS. *Gulf Offshore*, 453 U.S. at 479 n.7.

Having ceded control over submerged lands within the three-mile belt, Congress had no interest in allowing States to assert any sovereignty or direct legislative control over the OCS. Accordingly, it made federal law the exclusive source of law: "The Constitution and laws ... of the United States are extended to the subsoil and seabed of the [OCS] ... to the same extent as if the [OCS] were an area of

exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1); *see Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area.").

Congress recognized, of course, that "because of its interstitial nature, federal law would not provide a sufficiently detailed legal framework to govern life on the miraculous structures which will rise from the sea bed of the [OCS]." *Shell Oil*, 488 U.S. at 27. But the substantial gaps in the coverage of federal law neither deterred Congress from making federal law exclusive nor led Congress to adopt proposals that would have treated the OCS as if it were part of the adjacent state. *See Rodrigue*, 395 U.S. at 358-59. And, critically, under OCSLA, state law *never* applies on the OCS of its own force—*i.e.*, there is no state law applicable *qua* state law on the OCS. Instead, Congress borrowed state standards as federal law only to "fill federal voids," adopting state law as surrogate federal law to "supplement[] gaps in the federal law." *Id.* at 357-58; *see* 43 U.S.C. §1333(a)(2)(A) ("To the extent that they are applicable and not inconsistent with [federal law], the civil and criminal laws of each adjacent State ... are declared to be the law of the United States.").

This Court has repeatedly recognized the limited, gap-filling role of state law under OCSLA. This Court first addressed OCSLA's choice-of-law provisions in *Rodrigue*. The question there was whether Louisiana state law or the federal Death On The High Seas Act ("DOHSA") applied to wrongful-death actions filed by survivors of workers who died on drilling rigs. 395 U.S. at 352-53. This Court traced OCSLA's history, recounting that Congress rejected both the wholesale

application of maritime law and the wholesale application of state law and instead made federal law exclusive. *Id.* at 355-58. In describing state law's limited role, this Court repeatedly emphasized that state law applied only "to fill federal voids." *Id.* at 358; *see id.* at 357 ("[T]he Act supplemented gaps in the federal law with state law."); *id.* at 362 ("[T]he whole body of Federal law was made applicable to the area as well as state law where necessary." (alterations omitted)).

In light of state law's limited, gap-filling role, the *Rodrigue* Court reasoned that if the incidents at issue were within DOHSA's scope, then DOHSA would apply and provide "the exclusive remedy for these deaths." *Id.* at 353, 359. The Court determined, however, that the incidents did not occur on the "high seas" and therefore were outside DOHSA's scope. *Id.* at 359-60, 366. Because of the absence of applicable federal law, this Court held that OCSLA permitted the adoption of state law as surrogate federal law. *Id.* at 366. The "recurring theme" of *Rodrigue*, as the Fifth Circuit noted, is that state law does not apply on the OCS unless it is "necess[ary] to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036.

This Court's subsequent OCSLA cases are much the same. In *Huson*, 404 U.S. 97, this Court held that courts cannot fill the gaps in federal law by creating federal common law: "Congress made clear provision for filling in the gaps in federal law; it did not intend that federal courts fill in those gaps themselves by creating new federal common law." *Id.* at 104-05. That holding is necessarily premised on the idea that state law (and not federal common law) serves a

purely gap-filling role. Likewise, in *Gulf Offshore*, this Court reiterated that state law's role under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." 453 U.S. at 480; *see Maryland v. Louisiana*, 451 U.S. 725, 752 n.26 (1981) ("[OCSLA] borrows 'applicable and not inconsistent' state laws for certain purposes, such as were necessary to fill gaps in federal laws.").

This Court's cases thus all reflect that Congress borrowed state law standards as surrogate federal law not out of any respect for state sovereignty. To the contrary, Congress expressly rejected claims of state sovereignty over the OCS and reaffirmed its status as an exclusive federal enclave where all law is federal law. It follows ineluctably from that most basic congressional decision that state standards of conduct are borrowed out of necessity, not out of respect for state sovereignty and not where other federal law already applies and governs the conduct at issue. In short, this Court's repeated recognition that state law on the OCS is limited to a gap-filling role reflects not just the text of OCSLA but Congress' most fundamental judgment in enacting that statute.

2. The Ninth Circuit overlooked all of this in declaring that state law can apply on the OCS even without a gap in federal law. Its analysis was wrong at every turn.

Beginning with the text, the Ninth Circuit settled on its definition of "applicable" only by employing a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, "the words of a statute must be read

in their context and with a view to their place in the overall statutory scheme." *Id.* This Court's decision in *Ransom v. FIA Card Services*, 562 U.S. 61 (2011), which interpreted the word "applicable" in the phrase "applicable monthly expense amount," demonstrates how the analysis should proceed. The Court began by citing dictionaries that defined "applicable" as "appropriate, relevant, suitable, or fit." *Id.* at 69-70. But instead of stopping there and adopting a broad definition of "applicable," the Court considered how those definitions made the most sense in light of the statute's "text, context, and purpose." *Id.* at 80; *see id.* at 69-74. The Court concluded from its extensive contextual analysis that Congress must have used the word "applicable" as a limiting term—*i.e.*, to "filter[] out debtors for whom a deduction is not at all suitable." *Id.* at 74.

Here, in contrast, the Ninth Circuit simply went with the first dictionary definition it found. *See* App.21. Instead of assessing which dictionary definitions made the most sense in light of OCSLA's broader context, the Ninth Circuit merely declared that "applicable" must mean "pertain[ing] to the subject matter at hand." *Id.* That short-circuited analysis failed to read the words of the statute "in their context and with a view to their place in the overall statutory scheme." *Sturgeon*, 136 S. Ct. at 1070. Had the Ninth Circuit conducted the proper analysis, it would have concluded, like *Ransom*, that the word "applicable" serves a limiting function, narrowing the universe of state laws that may be considered for adoption as surrogate federal law—*i.e.*, that state law becomes "applicable" only when the

absence of federal law makes resort to state law "suitable" or "appropriate."

No other interpretation of "applicable" makes sense of Congress' deliberate judgment to reject state law as the default body of law governing the OCS. If "applicable" means that state law applies whenever it pertains to activities on the OCS without regard to the existence of any gap in federal law, then Congress achieved indirectly through a subsidiary provision the precise result it directly rejected in OCSLA's principal provisions. That simultaneously violates the elephants-in-mouseholes canon, *see Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001), and the direction that courts are to make "sense, not nonsense" out of federal statutes, *W.V. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 101 (1991). The far better interpretation is that state law is "applicable" only when there is no applicable federal law governing the subject, leaving a gap to be filled.

The Ninth Circuit's definition renders the word "applicable" superfluous. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word of a statute wherever possible"). If all Congress meant was that state law must "pertain to the subject matter at hand," it could have omitted the word "applicable" altogether and achieved the same result; the only laws that *ever* apply to a lawsuit are ones that pertain to the subject matter at hand.[2] Thus, as the Fifth Circuit

---

[2] Tellingly, after embracing its definition of "applicable," the Ninth Circuit never analyzed whether California's wage-and-hour laws were "applicable" under that definition—presumably because the laws a plaintiff invokes are invariably "pertinent to the subject matter" of his lawsuit.

put it in *Continental Oil*, the Ninth Circuit's approach places "100% Emphasis" on the phrase "not inconsistent with" and leaves no role for "applicable." 417 F.2d at 1035. In contrast, interpreting the statute to adopt state law only when needed to fill a gap in federal law "ensures that the term 'applicable' carries meaning, as each word in a statute should." *Ransom*, 562 U.S. at 70.

The decision below also fails to account for OCSLA's historical context, which (as outlined above) makes crystal clear that state law standards play only a limited, gap-filling role as borrowed federal standards. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed."). Except for a passing acknowledgement that "Congress was solicitous to retain and ... assert[] the federal government's civil and political jurisdiction over the OCS," App.22-23, the Ninth Circuit breezed right past the historical circumstances surrounding OCSLA's passage, including the very ones on which this Court relied in *Rodrigue*, 395 U.S. at 355-59, and *Gulf Offshore*, 453 U.S. at 478-83.

The Ninth Circuit largely ignored the historical materials this Court invoked in *Rodrigue*. The Senate Report explains that under OCSLA, the body of law applicable on the OCS consists of: (a) federal constitutional and statutory law; (b) federal regulations; and "(c) *in the absence of such applicable Federal law or adequate Secretarial regulation*, the civil and criminal laws of the State adjacent to the [OCS]." S. Rep. No. 83-411, at 2 (1953) (emphasis

added). And on the Senate floor, advocates and opponents of the bill both recognized that state law's only role was to fill gaps. *See* 99 Cong. Rec. 7164 (1953) (Sen. Anderson: "[W]here there is a void, the State law may be applicable."); 99 Cong. Rec. 7257 (1953) (Sen. Long: "[W]hen the Federal law is silent, the State law will apply.").

The Ninth Circuit studiously avoided all of this, instead marshaling irrelevant snippets of legislative history—and even those cherry-picked statements provide little support. The Ninth Circuit quoted a statement by Senator Cordon that, according to the court, "emphasized the importance of ... state law." App.24. In reality, the quoted passage does not extol the importance of state law vis-à-vis federal law, but rather explains why the committee chose state law instead of maritime law to serve as "housekeeping law for the [OCS]" when there is a gap in federal law. 99 Cong. Rec. 6963 (1953).

3. Because state law does not apply on the OCS absent a gap in federal law, California's wage-and-hour law does not apply in this case. The FLSA is "a comprehensive legislative scheme." *Darby*, 312 U.S. at 109. The FLSA indisputably applies on the OCS and its protections are broad, shielding "all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers." *Barrentine*, 450 U.S. at 739. Because the FLSA applies to the OCS and comprehensively addresses wage-and-hour issues, there is "no gap" in the coverage of federal law—"not even a tiny one."

Nations, 483 F.2d at 589. The application and comprehensiveness of the FLSA is sufficient to make state labor law inapplicable under OCSLA as a general matter.

Examining Newton's specific claims reinforces that there is no gap for California's wage-and-hour law to fill vis-à-vis the FLSA. Newton's first and sixth claims allege minimum-wage and overtime violations. App.3. The FLSA addresses those issues by "establish[ing] federal minimum-wage, maximum-hour, and overtime guarantees." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Newton's second claim alleges pay stub violations, App.3, which the FLSA addresses by, *inter alia*, requiring employers to keep records of hours worked and wages paid, 29 U.S.C. §211(c). Newton's fifth claim complains of the failure to provide valid meal periods, App.3, which the FLSA addresses by requiring employers to compensate employees for any meal period that is not "bona fide," 29 C.F.R. §785.19. Newton's third claim, for unfair competition, App.3, is based on the same predicate acts as his wage and meal-period claims. Newton's fourth claim alleges failure to timely pay final wages, App.3, which the FLSA addresses by imposing penalties on employers who fail to pay terminated employees on the next regularly scheduled payday, 29 U.S.C. §216(b); App.58.[3]

In short, whether examined generally or in light of the specific state-law claims alleged in this case, the

---

[3] Because substantive state law does not reach the OCS, Newton's seventh claim, for civil penalties under California's private-attorney-general statute, also fails.

FLSA is fully applicable to the OCS and to Newton's claims and leaves no gaps for state law to fill. Thus, California's wage-and-hour law is not "applicable" as surrogate federal law. Just as DOHSA's application to the OCS would have rendered state law inapplicable in *Rodrigue*, 395 U.S. at 359, and just as the Longshore and Harbor Workers' Compensation Act's application to the OCS rendered state law inapplicable in *Nations*, 483 F.2d at 589, the FLSA's application to the OCS renders state law inapplicable here. As a result, the FLSA is plaintiffs' "exclusive remedy," *Rodrigue*, 395 U.S. at 359, and the decision below should be reversed.

B. California's Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes.

Even if, contrary to OCSLA and this Court's cases, state law could be deemed "applicable" as surrogate federal law despite the absence of a gap in federal law, the decision below would still be wrong because California wage-and-hour laws are "inconsistent with" the FLSA for OCSLA purposes. 43 U.S.C. §1333(a)(2)(A). As described above, each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way. Indeed, if the FLSA were consistent with state law on these issues, Newton presumably would have filed his claims under the FLSA instead of swimming upstream against the then-settled law established in *Continental Oil*.

The Ninth Circuit openly acknowledged that "California's minimum wage and overtime laws ... establish different and more generous

benchmarks than the ... FLSA's statutory and regulatory scheme." App.36-37. It held, however, that the differences between the two statutory schemes did not make them "inconsistent" for OCSLA purposes. App.35-36. In the court's view, California's wage-and-hour laws are consistent with the FLSA because the FLSA allows states to enact higher minimum-wage requirements and lower maximum workweek requirements. App.36; *see* 29 U.S.C. §218(a). In other words, the court held that California's wage-and-hour standards are "not inconsistent with" the very different rules under the FLSA because the latter does not preempt the former.

That conclusion reflects a fundamental misunderstanding of OCSLA's "not inconsistent with" standard. While the FLSA does not preempt state and local laws where they apply of their own force based on an exercise of the residual sovereignty of the states, that is irrelevant under OCSLA because state law *never* applies of its own force under OCSLA. When OCSLA borrows state law standards, it adopts them "as the law of the United States." *Rodrigue*, 395 U.S. at 356. Thus, whether the FLSA would preempt state law is not just irrelevant, but a fundamentally wrong question to ask. When Congress includes a savings clause in a statute like the FLSA, it does so out of the federalism-friendly impulse not to displace the residual sovereignty of the states. But such impulses are fundamentally misplaced on the OCS, where Congress has already made a deliberate judgment to reaffirm exclusive federal sovereignty and make all applicable law federal law. Put differently, Congress' decision in the FLSA to "save" the applicability of California law to Fresno says nothing about Congress'

very different decision in OCSLA to make federal law exclusive on the OCS.

Once it is clear that preemption principles are inapposite and the question under OCSLA is whether two *federal* regulatory regimes are consistent, the Ninth Circuit's error comes into sharp relief. If California's wage-and-hour law were incorporated into federal law, federal law would be riddled with contradictions; federal law would simultaneously require and not require employers to pay employees for their off-duty time on the platform, and simultaneously impose a minimum wage of $7.25 per hour and $11.00 per hour. While it would not be impossible to comply with both *federal* regimes, to say the two regimes are consistent would be to distort meaning and disregard Congress' evident intent in enacting OCSLA.

Finally, the Ninth Circuit's decision establishes the exact choice-of-law regime that Congress rejected. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language."). In the Ninth Circuit's view, state law controls on the OCS whenever it is not preempted. But that is exactly how the law applies within the borders of States: state law presumptively applies unless preempted by federal law. And Congress expressly repudiated proposals that would have treated the OCS as if it were part of the adjacent state. *See* p.7, *supra*. The Ninth Circuit's decision is thus contrary to the distinctive regime that Congress established for the OCS, underscoring the need for this Court's review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

September 24, 2018

APPENDIX

TABLE OF APPENDICES

Appendix A

Opinion, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Feb. 5, 2018) App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Apr. 27, 2018) App-42

Appendix C

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (May 16, 2018) App-44

Appendix D

In Chambers Order, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Inc.*, No. 15-cv-02517-RGK-AGR (Aug. 10, 2015) App-46

Appendix E

Relevant Statutory Provisions App-61

43 U.S.C. § 1332(1) App-61

43 U.S.C. § 1333(a)(1)-(2)(A) App-61

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Argued and Submitted: Mar. 7, 2017
Filed: Feb. 5, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

---

OPINION

CHRISTEN, Circuit Judge:

This case presents the novel question whether claims under state wage and hour laws may be

brought by workers employed on drilling platforms fixed on the outer Continental Shelf. Brian Newton worked on such a platform off the coast of Santa Barbara. His shifts lasted fourteen days and he regularly worked twelve hours per day. After Parker Drilling ("Parker") terminated him, Newton sued in state court for wage and hour violations under California law. Parker removed the case to federal district court and filed a motion for judgment on the pleadings. The district court granted the motion, concluding that the Fair Labor Standards Act is a comprehensive statutory scheme that is exclusive of California wage and hour laws. Newton appeals. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We hold that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2)(A). We thus reject the proposition that "necessity to fill a significant void or gap," *Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F. 2d 1030, 1036 (5th Cir. 1969), is required in order to assimilate "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), state law into federal law governing drilling platforms affixed to the outer Continental Shelf. We therefore vacate the district court's dismissal of Newton's claims and remand for further proceedings consistent with this opinion.

I. Factual & Procedural Background

Newton worked as a roustabout and painter for Parker on drilling platforms in the Santa Barbara Channel from approximately January 2013 to January 2015. It is uncontested that the drilling

platforms where he worked were located more than three miles offshore and fixed to the seabed of the outer Continental Shelf. His fourteen-day shifts, known in the industry as "hitches," comprised twelve hours on duty followed by twelve hours on "controlled standby." Newton was paid for twelve hours of work per day and he was not able to leave the platform during his shifts. Newton alleges that he usually took fifteen to thirty minutes during his shifts to eat without clocking out or ate while not working and remaining on call, and that Parker did not provide thirty-minute meal periods for each five hours worked, as required by California law. Parker paid Newton twice per month. In addition to compensation for twelve hours per day, his pay stubs showed pay for "two hours for the boat ride out, back and debriefing with the next crew."

Newton filed a putative class action in California state court on February 17, 2015. Although Parker paid an hourly rate well above California and federal minimum wage, Newton maintained that California law required Parker to pay him for the twelve hours he was on controlled standby each day. The First Amended Complaint (FAC) alleged that Newton's final paycheck did not include all the wages owed to him, "including the overtime/doubletime and meal period wages." In all, Newton brought seven causes of action under California law for: (1) minimum wage violations; (2) failure to pay overtime and doubletime; (3) pay stub violations; (4) failure to pay timely final wages; (5) failure to provide lawful meal periods; (6) civil penalties under the Private Attorney General Act of 2004 (PAGA); and (7) unfair competition.

Parker removed the action to federal court and filed a motion for judgment on the pleadings. Parker argued that, under the Outer Continental Shelf Lands Act, 43 U.S.C. § § 1331-1356b (OCSLA), the Fair Labor Standards Act (FLSA) is a comprehensive statutory scheme that leaves no room for state law to address wage and hour grievances arising on the OCS.[1] For his part, Newton contended that California's more protective wage and hour laws may be applied concurrently with the minimum guarantees of their federal counterpart. *See* 29 U.S.C. § 201, *et seq*. Newton's opposition did not explain the complaint's allegation that some of Parker's allegedly unlawful conduct occurred in California rather than on the OCS, but did request that if the district court were to grant Parker's motion, it do so "without prejudice to allow Plaintiff to correct any deficiencies."[2]

The district court granted Parker's motion for judgment on the pleadings, reasoning that "under [the] OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." Finding no significant voids or gaps in the FLSA, the district court held that Newton could not invoke California wage and hour

---

[1] We collectively refer to the outer Continental Shelf and the devices attached to it for the purposes enumerated in the statute as "the OCS."

[2] The FAC alleged, without elaboration, that "the unlawful employment practices complained of herein occurred in the City of Goleta, California, County of Santa Barbara." On appeal, Newton argues that "at least some of the alleged California wage-and-hour violations took place on vessels to and from California's coast and on the coast of California."

laws as surrogate federal law. The district court reached this decision after considering the Department of Labor (DOL) regulations elaborating the FLSA. While recognizing that the FLSA has a savings clause that expressly allows for more protective state minimum wage and overtime laws, the district court nevertheless concluded that California wage and hour claims were unavailable to Newton. The district court did not address Newton's request for leave to amend. Newton timely appealed.

II. Standard of Review

A dismissal on the pleadings pursuant to Rule 12(c) is reviewed *de novo*. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011). "Dismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

III. Discussion

Except for any claims that may have arisen while Newton was transiting to and from the offshore drilling platforms where he worked, Newton's grievances relate to his employment on the OCS, and the parties agree that the fate of Newton's appeal rests on the OCSLA's choice of law provision. *See* 43 U.S.C. § 1333(a)(2)(A).

A. The Outer Continental Shelf Lands Act

1. OCSLA's Choice of Law Provision

The outer Continental Shelf generally refers to submerged lands lying more than three miles offshore, outside the territorial jurisdiction of the states. *See* 43

U.S.C. §§ 1331(a), 1301(a)(2); *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010). Subject to certain exceptions and conditions, the OCSLA declares that the Constitution and laws of the United States extend to the outer Continental Shelf, as well as "*all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed* . . . for the purpose of exploring for, developing, or producing resources therefrom . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1) (emphasis added). OCSLA's assertion of jurisdiction is unique because it comprises the ocean floor but not the waters above it. "[T]he jurisdiction asserted is a 'horizontal jurisdiction' and does not affect the status of superjacent waters." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 34 (1953) (citing S. Rep. No. 83-411, at 2 (1953)). The OCSLA's choice of law provision declares:

> To the extent that they are *applicable and not inconsistent* with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, *the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of*

> *the outer Continental Shelf*, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area.

43 U.S.C. § 1333(a)(2)(A) (emphasis added). Because the OCSLA makes plain that the laws of the adjacent state are to apply to drilling platforms fixed to the seabed of the outer Continental Shelf as long as state law is "applicable and not inconsistent with . . . Federal laws," the parties' dispute turns on the interpretation of the terms "applicable" and "not inconsistent." *Id.*

The Supreme Court has not been called upon to decide a case involving wage and hour laws on the OCS. Both Newton and Parker ask us to look to the Fifth Circuit's interpretation of the OCSLA for guidance. Though the parties disagree as to the Fifth Circuit's prevailing test for choice of law on the OCS, they both argue that we ought to follow the Fifth Circuit's lead and adopt the approach it has taken in cases involving injury, wrongful death, and contract claims arising on the OCS. Newton urges that the Fifth Circuit's test is the one set out in *Union Texas Petroleum Corp. v. PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) (*PLT*). According to Newton, platform workers may bring state wage and hour claims to the extent that state law is not inconsistent with existing federal law, *see Breton Energy, L.L.C. v. Mariner Energy Res., Inc.*, 764 F.3d 394, 398 (5th Cir. 2014), and California's wage and hour laws are not inconsistent with the FLSA insofar as they are preserved by the FLSA's savings clause. Relying on *Continental Oil*, 417 F.2d at 1036, Parker argues that

the FLSA is a comprehensive statutory and regulatory scheme that leaves no voids or gaps for state law to fill, so state wage and hour laws do not apply on the OCS and Newton's grievances may be redressed only by the FLSA.

Having examined the text of the original OCSLA and its 1975 amendment, the legislative history, and the Supreme Court's case law addressing the Act, we hold that state wage and hour laws are adopted as surrogate federal law on the OCS as long as they are "applicable and not inconsistent" with existing federal law.

2. Origins of the OCSLA

"The OCSLA grew out of a dispute, which first developed in the 1930's, between the adjacent States and the Federal Government over territorial jurisdiction and ownership of the OCS and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). Passed in 1953,"[t]he purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the outer Continental Shelf." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

Congress initially considered extending maritime law to the OCS, but it envisioned that 10,000 or more people might eventually be employed on the OCS to develop mineral resources.[3] *See* 99 Cong. Rec. 6963-64

---

[3] "[L]arge crews of men will work on the miraculous structures which will rise from the sea bed of the outer Continental Shelf. These men will die, leave wills, and pay taxes. They will fight,

(1953); *Shell Oil*, 488 U.S. at 27 n.8. Anticipating a broad range of activity associated with this mineral resource development, Congress feared that federal law, standing alone, would be inadequate because it "was never designed to be a complete body of law in and of itself." 99 Cong. Rec. 6963 (1953). Congress also rejected the incorporation of the OCS into the boundaries of the several states, *see* S. Rep. No. 83-411, at 6 (1953), deciding instead that existing federal law and the law of the abutting state (except for state taxation laws)[4] were to comprise the body of law governing the OCS. Because the Department of Justice and several members of Congress voiced concerns that the prospective incorporation of state laws on the OCS might be an unconstitutional delegation of Congress's legislative authority, S. Rep. No. 83-411, at 33 (1953); *see* 99 Cong. Rec. 6963-64 (1953), the OCSLA only borrowed state law then in existence.[5] Thus, as originally adopted in 1953,

---

gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job. . . . the whole circle of legal problems familiar to the upland could occur on these structures." Christopher, *supra*, at 37.

[4] 43 U.S.C. § 1333(a)(2)(A) provides: "State taxation laws shall not apply to the outer Continental Shelf."

[5] As explained by Senator Cordon while introducing the bill to the Senate: "The enactment as Federal law by reference of the laws of the several abutting States meets the major constitutional objection, in that the laws so adopted are the laws as they exist at the time of the enactment of S. 1901. Only already existing State laws will become the law of the United States, and the amendatory legislation by the States thereafter will not be applicable, unless made so by later Federal legislation." 99 Cong. Rec. 6963-64 (1953); *see also* Christopher, *supra*, at 42.

"applicable" state law for purposes of § 1333(a)(2)(A) referred to state non-tax law, in existence on the effective date of the Act, that bore on the relevant subject matter.

The "applicable" state law for purposes of § 1333(a)(2)(A) changed in 1975 when Congress enacted the Deepwater Port Act, 33 U.S.C. §§ 1501, *et seq.*, and simultaneously amended the OCSLA, *see* Pub. L. No. 93-627, § 19(f), 88 Stat. 2176 (1975). By then, *United States v. Sharpnack*, 355 U.S. 286 (1958), had allayed the concern that the prospective adoption of state law might amount to an unconstitutional delegation of congressional legislative authority.[6] The 1975 amendment redefined state law in § 1333(a)(2)(A) as "the civil and criminal laws of each adjacent State, now in effect *or hereafter adopted, amended, or repealed.*" § 1333(a)(2)(A) (emphasis added). This amendment ensured that the same law governed resource development structures on the OCS and deep water ports.[7] The OCSLA's choice of law

---

[6] In *Sharpnack*, the Supreme Court sustained the Assimilative Crimes Act of 1948 (Crimes Act) against the challenge that Congress, in enacting the Crimes Act, impermissibly delegated its legislative authority to the states. 18 U.S.C. § 13; 355 U.S. at 286. The Crimes Act makes the version of state law enforceable at the time of allegedly unlawful conduct applicable, in conjunction with federal criminal law, on federal enclaves. *Sharpnack* explained that Congress's "deliberate continuing adoption" of state criminal law for federal enclaves does not rise to an unconstitutional delegation of legislative authority to the states because Congress always has the power to exclude a state law from the scope of the Crimes Act. 355 U.S. at 294.

[7] As explained in the Joint Report of the Committees on Commerce, Interior and Insular Affairs, and Public Works to the Senate, the Department of Justice sought the 1975 amendment

provision has not undergone significant statutory amendments since 1975.

3. Judicial Interpretation of the OCSLA

The Supreme Court first applied the OCSLA's choice of law provision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 355 (1969). The families of two workers who perished on drilling rigs fixed to the outer Continental Shelf off the Louisiana coast brought claims pursuant to Louisiana state law and the Death on the High Seas Act (High Seas Act). 395 U.S. at 352-53 (1969); *see* 46 U.S.C. §§ 30301-08. The High Seas Act provides an admiralty remedy for deaths resulting from traditional maritime activity on the high seas, i.e., in waters three or more nautical miles from shore. *See Rodrigue*, 395 U.S. at 359. The trial courts in the two cases that were consolidated in the *Rodrigue* appeal dismissed the state wrongful death claims, ruling that the federal statutory remedy was exclusive. *Id.* at 353-54. The Fifth Circuit affirmed that ruling, but the Supreme Court reversed. *Id.* at 355. The Supreme Court explained that the OCSLA requires fixed drilling platforms to be treated as artificial islands or federal enclaves within a landlocked state, not as vessels. *Id.* As such, "the [federal] admiralty action under the [High] Seas Act no more applies to these accidents actually occurring

---

to the OCSLA because, "from an enforcement point of view," it wanted the same law applied to all deepwater ports and structures erected on the OCS, *see* S. Rep. No. 93-1217, at 76 (1974), and "no provision was made in the Outer Continental Shelf Lands Act to apply State laws as adopted, amended or repealed, *after* the date of enactment of that Act." *Id.* at 60.

on the islands than it would to accidents occurring in an upland federal enclave."[8] *Id.* at 366. Moreover, since the accidents befalling the workers "involved no collision with a vessel, and the structures were not navigational aids," their deaths were not attributable to traditional maritime activity. *Id.* at 360. Hence, the High Seas Act's maritime remedy was unavailable, and "any obstacle to the application of state law by incorporation as federal law through [§ 1333(a)(2)]" was "remove[d]." *Id.* at 366.

In reaching this result, *Rodrigue* first examined the language of § 1333(a)(2), which, as originally enacted, expressly incorporated then-existing state laws "[t]o the extent that they are applicable and not inconsistent" with federal law. *See id.* at 356 n.3 (quoting 43 U.S.C. § 1333(a)(2)(A)). The Supreme Court concluded from its analysis of the text that "federal law is 'exclusive' in its regulation of [the OCS], and that state law is adopted only as surrogate federal law." *Id.* at 357. From the Senate Committee Report, the Conference Report, and the debate on the floor of the Senate, the Court found support for "[t]he principles that federal law should prevail, and that state law should be applied only as federal law and then only when no inconsistent federal law applie[s]". *Id.* at 357-59 (citing S. Rep. No. 83-411, at 11 (1953); H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess., 12

---

[8] "[A] state may not legislate with respect to a federal enclave unless it reserved the right to do so when the state gave its consent to the purchase by the United States[;] only state laws existing at the time of the acquisition remain enforceable. Subsequent state laws are only enforceable if Congress provides for assimilation of later-enacted state controls." 3 William J. Rich, *Modern Constitutional Law* § 34:49 (3d ed. 2016).

(1953); 99 Cong. Rec. 6962-63, 7164, 7232-36 (1953)). "This legislative history buttresse[d] the Court of Appeals'[s] finding that in view of the inconsistencies between the state law and the [High] Seas Act, the [High] Seas Act remedy would be exclusive if it applied." *Id.* at 359.

But the High Seas Act remedy did not apply. The Supreme Court recounted that while introducing the OCSLA bill to the Senate, Senator Cordon explained that the Committee on Interior and Insular Affairs initially attempted to "provide housekeeping law" for the OCS by treating drilling platforms as vessels subject to maritime law. *Rodrigue*, 395 U.S. at 361 (quoting 99 Cong. Rec. 6963 (1953)). The Committee, however, eschewed this approach because "[t]he so-called social laws necessary for protection of the workers and their families would not apply[, including] such things as unemployment laws, industrial-accident laws, fair-labor-standard laws, and so forth. Ultimately, instead, the whole body of Federal law was made applicable to the area as well as state law where necessary." *Id.* at 362 (original alterations and quotation marks omitted). The *Rodrigue* court concluded from its "[c]areful scrutiny of the hearings which were the basis for eliminating from the [OCSLA] the treatment of artificial islands as vessels . . . that the motivation for this change, together with the adoption of state law as surrogate federal law, was the view that maritime law was inapposite to these fixed structures." *Id.* at 363. In sum, *Rodrigue* dispelled the misconception that maritime law applied perforce to drilling platforms on the outer Continental Shelf. Since federal law made

no provision for wrongful death claims on the OCS,[9] the Supreme Court held that the OCSLA adopted state law as the applicable surrogate federal law. *Id.* at 365-66.

Notably, *Rodrigue* did not require the court to address a situation where state law *and* existing federal law made provisions for the type of claim asserted; no relevant federal cause of action for wrongful death existed. *Rodrigue* is therefore of faint value for resolving a case like the instant one, where both state and federal law are potentially applicable to Newton's wage and hour grievances.

The Supreme Court revisited the OCSLA choice of law provision in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Huson filed a personal injury suit against a non-employer defendant, Chevron, for damages arising from a back injury he suffered while working on Chevron's artificial island drilling rig on the outer Continental Shelf. *Id.* at 98. The parties' dispute centered on the timeliness of the plaintiff's claims. *Id.* The Fifth Circuit resorted to the federal admiralty doctrine of laches, but the Supreme Court reversed, holding that Louisiana's one-year statute of

---

[9] The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, *et seq.*, provides a federal remedy for a non-seaman maritime employee to recover against an employer for personal injuries. *See Figueroa v. Campbell Indus.*, 45 F.3d 311, 315 (9th Cir. 1995). The OCSLA extends the LHWCA to the OCS, 43 U.S.C. § 1333(b), but defendants in *Rodrigue* were not the workers' employers. *See Rodrigue*, 395 U.S. at 354.

limitations should have controlled.[10] *Id.* at 105. The *Huson* court explained that in enacting the OCSLA, Congress expressed an intent for courts to fill "gaps" in existing federal law by applying state law, not by creating federal common law. *Id.* at 104-05 (internal quotation marks omitted). Like *Rodrigue*, *Huson* did not resolve a claimed inconsistency between potentially applicable state and federal laws. Nor did *Offshore Logistics Inc. v. Tallentire*, 477 U.S. 207 (1986), which considered whether the High Seas Act or state law governed wrongful death actions brought after a helicopter transporting two OCS platform workers crashed into the sea. *Id.* at 209. Starting from the observation that the text of the OCSLA precludes its application to the high seas over the outer Continental Shelf, the Supreme Court rejected "the proposition that it is the decedent's status or his special relationship with the shore" that triggers OCSLA's choice of law provision in § 1333(a)(2)(A), "regardless of the location of the accident." *Id.* at 219. Locale is key, and because "the fatalities underlying [the] suit . . . occurred on the high seas" rather than on the OCS, the High Seas Act—not the OCSLA—controlled. *Id.* at 220.

Surveying the Supreme Court's OCSLA jurisprudence, we conclude that there are three questions that must be asked in any case involving choice of law under § 1333(a)(2)(A) of the OCSLA. First, the threshold question is whether the situs of the controversy is the OCS. *See Tallentire*, 477 U.S. at

---

[10] Because Huson initiated his action before the Supreme Court announced its decision in *Rodrigue*, the Court declined to apply this holding to his claims. *Huson*, 404 U.S. at 99-100.

218-19; *cf. Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 222 (2012) (holding that in contrast to § 1333(a)(2)(A), the OCSLA's provision for workers' compensation, § 1333(b), covers employees who can establish a "substantial-nexus" between their injury and extractive operations on the OCS). If the situs is not the OCS, the OCSLA's choice of law provision cannot apply. *See Tallentire*, 477 U.S. at 220. Second, if the situs is the OCS, we then ask whether there is any federal law applicable to the dispute. *See Rodrigue*, 395 U.S. at 366. If there is not, then state law generally applies. *See id.*; *Huson*, 404 U.S. at 101. Third, if there is federal law applicable to the dispute, then we "must consider the content of both potentially applicable federal and state law" and ask whether any applicable state law is inconsistent with federal law. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 486 (1981). As a contemporary commentator on the OCSLA presciently warned, "[w]hich state laws 'are applicable and not inconsistent' with federal laws and regulations will be open to constant interpretation and controversy." Christopher, *supra*, at 42.

The "seemingly innocuous extension of state law raised to the status of surrogate federal law raises extremely complex questions of interpretation[,]" particularly in addressing choice of law. 1 Thomas J. Shoenbaum, *Admiralty & Maritime Law* § 3-9 (5th ed. 2016). The Fifth Circuit has elaborated two strands of jurisprudence stemming from *Rodrigue*. According to the Fifth Circuit's *Continental Oil* line of cases, "the recurring theme of *Rodrigue* 'requires that "applicable" [state law] be read in terms of necessity—necessity to fill a significant void or gap'" in existing federal law. *Nations v. Morris*, 483 F.2d 577, 585 (5th

Cir. 1973) (quoting *Cont'l Oil*, 417 F.2d at 1036). The Fifth Circuit last applied the *Continental Oil* test in 1985 in *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) (per curiam),[11] where the court considered whether a drilling platform worker could maintain a Louisiana retaliatory discharge action even though the Longshore and Harbor Workers' Compensation Act (LHWCA) provides a federal remedy for retaliatory discharge. LeSassier was a platform worker who had been injured on an outer Continental Shelf platform. *LeSassier*, 776 F.2d at 507. After filing a successful claim for benefits under the LHWCA, LeSassier was fired. *Id.* He brought a state law action against his former employer alleging retaliatory discharge, but the district court concluded LeSassier could not rely on state retaliatory discharge law. *Id.* The Fifth Circuit affirmed, holding that "no gap" in federal law existed because "Congress provided a specific statutory provision [in the LHWCA] (33 U.S.C. § 948a) to address retaliatory discharges." *Id.* at 509. The court of appeals declined to "selectively apply[] only those parts of the overall LHWCA statutory structure which [LeSassier] happen[ed] to favor and ignore less favorable provisions." *Id.* at 508. In Parker's view, *Continental Oil* and its progeny establishes that, at least in the Fifth Circuit, state law is only applicable on the OCS if it is necessary to resort to state law to fill a gap or

---

[11] The *Continental Oil* test was also briefly alluded to in the footnotes of two later cases: *Oceanic Butler, Inc. v. Nordahl*, 842 F.2d 773, 777 n.4 (5th Cir. 1988) and *Mesa Operating Ltd. v. U.S. Dep't of Interior*, 931 F.2d 318, 325 n.48 (5th Cir. 1991).

void in federal law. Parker urges us to adopt such a rule.

Newton advocates for the adoption of the *PLT* test as applied in the Fifth Circuit's more recent lines of cases. The *PLT* test distills *Rodrigue* thus: "[F]or state law to apply as surrogate federal law, three conditions must be met: '(1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil seabed, or artificial structures permanently or temporarily attached thereto)[;] (2) Federal maritime law must not apply of its own force[;] (3) [t]he state law must not be inconsistent with Federal law.'" *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (en banc) (quoting *PLT*, 895 F.2d at 1047). The Fifth Circuit applied the third prong of this test in *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996), *overruled on other grounds by Grand Isle Shipyard*, 589 F.3d at 788 n.8. *Hodgen* arose from an accident suffered by an operator while executing a swing rope transfer from a OCS platform to a vessel. 87 F.3d at 1516. The operator settled his personal injury claims against the defendants who then litigated questions of comparative fault and indemnity between themselves. *Id.* at 1517. An agreement between the operator's employer and the charterer contained a clause requiring the former to indemnify the latter for costs and damages, but the Louisiana Oilfield Indemnity Act (LOIA) forbade any such transfer of liability. *Id.* at 1522. The charterer argued that the LOIA should not be adopted as surrogate federal law because it was inconsistent with federal law. *Id.* at 1528. The Fifth Circuit, relying on its prior decision in *Knapp v. Chevron USA, Inc.*, 781 F.2d 1123 (5th Cir. 1986), summarily rebuffed this contention.

Hodgen, 87 F.3d at 1528. *Knapp* concluded that because the 1984 amendments to the LHWCA were silent as to indemnity agreements addressing injuries caused by the negligence of non-vessels and nothing signaled Congress's intent that the amendments should "preempt the field," Louisiana's Oilfield Indemnity Act was not inconsistent with federal law and, therefore, the OCSLA "makes [the LOIA] the applicable surrogate law on fixed platforms offshore Louisiana." *Knapp*, 781 F.2d at 1131. *Hodgen* and *Knapp* suggest that the Fifth Circuit's *PLT* test looks to congressional intent regarding preemption to determine whether state law is inconsistent with a federal statutory scheme.

It remains unclear whether the *PLT* test has superseded the *Continental Oil* test in the Fifth Circuit, or whether the Fifth Circuit views the *Continental Oil* test as a precursor to the *PLT* test, such that the *PLT* conditions come into play only if there is a significant gap or void in federal law. *See Tetra Techs., Inc. v. Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016). Despite questions about the *PLT* test, in respects not here pertinent,[12] Newton argues that

---

[12] *See Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 214 (5th Cir. 2013) (Clement, J., writing for herself) ("Although the application of maritime law under OCSLA may be contrary to the intention of Congress, we are bound by our precedent to apply maritime law as the substantive rule of decision where it otherwise applies 'of its own force.'"); *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 505 n.2 (5th Cir. 2002) (DeMoss, J., dissenting) (noting that "there is no statutory basis" for examining whether maritime law applies of its own force under the second prong of the *PLT* test), *overruled on other grounds by Grand Isle Shipyard*, 589 F.3d at 788 n.8.

the *PLT* test should be adopted as the law of the Ninth Circuit.

B. The Instant Case

1. Newton's Claims under California Minimum Wage and Overtime Law

Parker paid Newton an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours. Newton's principal wage and hour objection is that he was not properly compensated for standby hours on the drilling platform. We know of no appellate case law examining whether, for the purposes of the OCSLA, state wage and hour laws are inconsistent with the federal Fair Labor Standards Act.[13]

a. Text and Legislative History of the OCSLA

To resolve the issue of first impression presented by Newton's appeal, "[w]e start, as we must, with the language of the statute[,]" *Bailey v. United States*, 516 U.S. 137, 144 (1995). "[W]hen the statute's language

---

[13] District courts within the Ninth Circuit have considered whether California wage and hour laws apply as surrogate federal law on the OCS. *See, e.g.*, *Williams v. Brinderson Constructors Inc.*, No. CV 15-2474- MWF(AGRx), 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015); *Reyna v. Venoco, Inc.*, No. CV 15-4525 PA (RAOx) (C.D. Cal. October 23, 2015); *Espinoza v. Beta Operating Co.*, No. CV 15-04659-RGK (ASx) (C.D. Cal. Oct. 29, 2015); *Jefferson v. Beta Operating Co.*, No. CV 15-04966 SJO (PLAx) (C.D. Cal. Nov. 3, 2015); *Garcia v. Freeport-McMoran Oil & Gas LLC*, No. CV 16-4320-R (C.D. Cal. Sept. 16, 2016). Except where parties contractually agreed for state law to control, these district courts concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill.

is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (internal quotation marks omitted).

The OCSLA makes the laws of the adjacent state, "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws . . . the law of the United States." 43 U.S.C. § 1333(a)(2)(A). "[W]ords used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns v. Alcala*, 420 U.S. 575, 580 (1975). In its *ordinary* sense, "applicable" state law, as that term was employed in the 1953 version of the statute, means the non-tax law of the abutting state—frozen in time—that pertained to the subject matter at hand. *See, e.g.*, *Applicable*, Funk & Wagnalls Standard Dictionary of the English Language (1958) ("Capable of or suitable for application; relevant; fitting"). The 1975 amendment to the OCSLA did not change the significance of the word "applicable," except that the state laws to be adopted became "the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed." 43 U.S.C. § 1333(a)(2)(A); *see, e.g.*, *Applicable*, Webster's New World Dictionary of the American Language (1972) ("that can be applied; appropriate"). Thus, we first observe that the "ordinary, contemporary, common meaning," *Williams v. Taylor*, 529 U.S. 420, 431 (2000), of "applicable" does not lend itself to the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law.

Moreover, we generally "presume [that] Congress says what it means and means what it says." *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1848 (2016). Congress could have said "necessary," or employed words to that effect, in § 1333(a)(2)(A). In another statute, Congress authorized the courts to borrow state common law where "the laws of the United States . . . are not adapted to the object [of the applicable federal statutes], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law[.]" 42 U.S.C. § 1988(a). Congress did not make any such qualification here.

Legislative history, however pellucid, cannot rewrite the language of a statute, *Am. Rivers v. FERC*, 201 F.3d 1186, 1204 (9th Cir. 1999), but "clear evidence of congressional intent may illuminate ambiguous text." *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

The Fifth Circuit in *Continental Oil* navigated OCSLA's choppy waters by taking legislative history as its lodestar. 417 F.2d at 1034-36. *Continental Oil* noted the "deep political and emotional currents centered around the clash between national sovereignty and states' rights" during the passage of the OCSLA and Congress's "express reject[ion]" of the "notion of supremacy of state law administered by state agencies." *Id.* at 1036. The Fifth Circuit concluded that "the deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Id.* (footnote omitted).

The legislative history indicates that Congress was solicitous to retain and indeed, assert, the federal

government's civil and political jurisdiction over the OCS, but we are not persuaded that this consideration justifies judicial substitution of "necessary" for the actual statutory term, "applicable." These two terms are manifestly different, and the latter does not connote the former. The OCSLA commands us to give force to "applicable and not inconsistent" state laws as surrogate federal law. 43 U.S.C. § 1333(a)(2)(A). By following the course charted by the OCSLA, we do not accord state law supremacy over federal law, nor cede the United States' jurisdiction over the OCS to state agencies. We simply acknowledge, as the Supreme Court did in *Rodrigue*, 395 U.S. at 355-56, that Congress adopted state law as surrogate federal law for the OCS, so long as it is "applicable and not inconsistent with" existing federal law.

Nor do we find in the legislative history a clear intent on the part of Congress to require a "significant void or gap" in federal legislation or regulation, meaning the complete absence of any federal law, as a prerequisite to the application of state law. Indeed, Senator Cordon, the floor manager of the bill, noted that the contemplated extension of admiralty law to the OCS was unsatisfactory because:

> The so-called social laws necessary for protection of the workers and their families would not apply. I refer to such things as unemployment laws, industrial-accident laws, fair-labor-standard laws, and so forth. It was necessary that the protection afforded by such laws be extended to the outer Shelf area because of the fact that ultimately some

> 10,000 or more men might be employed in mineral-resource development there.

99 Cong. Rec. 6963 (1953); *see Rodrigue*, 395 U.S. at 362. Read in context, Senator Cordon's statements emphasized the importance of having state law apply to the OCS, and do not indicate that state laws had to be necessary to fill gaps or voids in federal law *before* they would be adopted as surrogate federal law. *See Rodrigue*, 395 U.S. at 363. As Senator Cordon went on to explain:

> [T]he legal situation [of the OCS] is comparable to that in areas owned by the Federal Government under the exclusive jurisdiction of the Federal Government and lying within the boundaries of a State in the uplands.
>
> As a part of the same amendment, the [Senate Committee on Interior and Insular Affairs] provided, first, that the laws of abutting States should become a part of the Federal law within such areas opposite the States as would have been included in the States were their boundaries extended to the edge of the Continental Shelf.
>
> . . . .
>
> The outer Continental Shelf will have the protection of the Constitution itself, *and will have the protection and provision for conduct of affairs as given by the laws of each of the abutting States* within the area immediately opposite that State.

99 Cong. Rec. 6963-64 (1953) (emphasis added); *see* S. Rep. No. 83-411, at 11 (1953).

Read in isolation, some remarks by Senators Anderson and Long seem to endorse the idea that state law was to speak as federal law only where existing federal law was "silent" or otherwise left a "void." 99 Cong. Rec. 7257, 7164 (1953). But "scattered floor statements by individual lawmakers . . . [are] 'among the least illuminating forms of legislative history.'" *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1661 (2017) (quoting *NLRB. v. SW General, Inc.*, 137 S. Ct. 929, 943 (2017)); *see Shell Oil*, 488 U.S. at 29 ("We . . . find that Shell's reliance on an isolated statement by Senator Long," who was a "vocal opponent of the OCSLA," "is misplaced."); *see also Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999) ("This circuit relies on official committee reports when considering legislative history, not stray comments by individuals . . . ."). Here, the legislative history is at best muddled, as illustrated by the following exchange between Senator Cordon, the floor manager of the bill, and Senator Daniel:

> Mr. DANIEL: . . . *Since we have applied State laws in the fields which are not covered by Federal laws or by regulations* of the Secretary of the Interior, I should like to ask the Senator from Oregon whether he understands that State laws relating to conservation will apply in this area until and unless the Secretary of the Interior writes some rule or regulation to the contrary.

> Mr. CORDON: There can be no question about that; the Senator's statement is correct. *The language clearly adopts State law as Federal law where it is not inconsistent with existing Federal law or with the rules and regulations of the Secretary of the Interior*: and, of necessity, the inconsistency with respect to rules and regulations of the Secretary of the Interior must be in the case of those rules and regulations which it is within the power of the Secretary of the Interior to adopt.
>
> When he has adopted them, those rules and regulations *must be inconsistent with or in conflict* with the conservation laws of the States, which are then the conservation laws of the United States with respect to that particular area, *or else the laws of the States, having been adopted by the United States, apply to that area.* There can be no question about it.

99 Cong. Rec. 7264 (1953) (emphasis added). We cannot allow "ambiguous legislative history . . . to control the ordinary meaning of [the] statutory language." *League to Save Lake Tahoe, Inc. v. Trounday*, 598 F.2d 1164, 1172 (9th Cir. 1979) (citing *NLRB v. Plasterer's Local No. 79*, 404 U.S. 116, 129-30 (1971)); *see Milner*, 562 U.S. at 572. Reading the plain text of the OCSLA against the background of its inconclusive legislative history, we are not convinced that state law applies as surrogate federal law on the OCS only if "necess[ary]," *Cont'l Oil*, 417 F.2d at 1036,

in the sense that there is no existing federal law on the subject.

We do not understand the Supreme Court to have instructed otherwise. Although the Fifth Circuit has sometimes described "necessity to fill a significant void or gap" as the "recurring theme of *Rodrigue*," *Nations*, 483 F.2d at 585 (internal quotation marks omitted); *Cont'l Oil*, 417 F.2d at 1036, the issue actually decided by *Rodrigue* was whether federal admiralty law applied on OCS platforms, 395 U.S. at 360, 366. *Rodrigue* established that, absent a maritime nexus, federal admiralty law does not extend to the OCS. *Id.* at 359-60. State law was deemed the law governing the two wrongful death actions in *Rodrigue*, but there was no competing applicable federal law, *id.* at 366, and the Supreme Court has not yet squarely confronted a situation where, as here, a state statutory scheme and an existing federal statutory scheme are both "potentially applicable" to a civil suit arising on the OCS. *Cf. Gulf Offshore*, 453 U.S. at 486-87.

b. The Meaning of "Not Inconsistent"

As we see it, because there are California and federal statutory schemes that are "applicable," in the ordinary sense of that term, to the parties' conflict, the determinative question in Newton's case is not which law is "applicable," but whether California wage and hour laws are "inconsistent with" existing federal law. 43 U.S.C. § 1333(a)(2)(A). If they are not inconsistent, the OCSLA dictates that state wage and hour grievances should be redressable as federal claims on the OCS.

We recently examined the usual meaning of "inconsistent" in *Ecological Rights Foundation v. Pacific Gas & Electricity Co.*, 874 F.3d 1083 (9th Cir. 2017), where we concluded that laws are inconsistent if they are mutually "incompatible, incongruous, [or] inharmonious." *Id.* at 1095 (quoting Webster's Third New International Dictionary (1971)).[14]

To further articulate a framework for deciding whether a state law is inconsistent with federal law under the OCSLA, we draw on cases that have arisen in the context of two statutes involving the incorporation of state law into federal law: (1) the Assimilative Crimes Act ("Crimes Act"), 18 U.S.C. § 13, and (2) 42 U.S.C. § 1988. We look to the Crimes Act because it is an example of Congress applying state law in conjunction with federal law on enclaves. We also consider 42 U.S.C. § 1988, because at the time Congress enacted the civil rights statutes, it recognized that federal civil rights law was not sufficiently comprehensive and would have to rely, in part, on state law to effectuate its objectives. *See Burnett v. Grattan*, 468 U.S. 42, 47 (1984). Similar to § 1333(a)(2)(A) of the OCSLA, 42 U.S.C. § 1988 conditions the incorporation of state law on it being "not inconsistent with the Constitution and laws of the United States."

In *Rodrigue*, the Supreme Court emphasized that drilling platforms on the OCS are "to be treated as island[s] or as federal enclaves within a landlocked State, not as vessels." 395 U.S. at 361. "The central

---

[14] *Ecological Rights Foundation* involved inconsistency between federal statutes. 847 F.3d at 1095.

principle of federal enclave doctrine is that Congress has exclusive legislative authority over . . . enclaves. But in the absence of applicable federal legislation displacing state law, those state laws that existed at the time that the enclave was ceded to the federal government remain in force." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1237 (10th Cir. 2012). State law postdating the creation of the enclave, however, is federal law on the enclave only if Congress so directs. *Id.*

The Assimilative Crimes Act is one such directive.[15] "The [Crimes Act] applies state criminal law to a defendant's acts or omissions [in federal enclaves] that are not made punishable by any enactment of Congress." *Lewis v. United States*, 523 U.S. 155, 159 (1998) (emphasis and internal quotation marks omitted). Its "basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves." *Id.* at 160. But as we have recognized, the Supreme Court has held that a void or gap—in the sense of a total absence of applicable federal law—is not a prerequisite to the application of state law under the Crimes Act. *See, e.g., United States v. Reed*, 734 F.3d 881, 888 (9th Cir. 2013) (citing *Lewis*, 523 U.S. at 166).

---

[15] 18 U.S.C. § 13(a), the Crimes Act, provides: "Whoever within or upon any [federal enclave] . . . is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State . . . in which such place is situated, . . . shall be guilty of a like offense and subject to a like punishment."

In *Lewis*, the Supreme Court formulated a two-step test for whether state law applies to a defendant accused of committing an offense on an enclave. 523 U.S. at 164-65. The first question is the statutory one: whether the defendant's act or omission has been made punishable by any enactment of Congress. *Id.* at 164. If the act is not punishable by federal law, then the Crimes Act presumptively assimilates state law. *Id.* If Congress has legislated to make the defendant's conduct punishable, then "the court must ask the further question whether the federal statutes that apply to the 'act or omission' *preclude* application of the state law in question," that is, whether "applicable federal law indicate[s] an intent to punish conduct such as the defendant's to the exclusion of the particular state statute at issue?" *Id.* at 164, 166 (emphasis added). There is no "touchstone to provide an automatic general answer to this second question," and the "primary question . . . is one of legislative intent . . . ." *Id.* at 165-66.

Reed employed *Lewis*'s two-step test to hold that a federal DUI regulation did not bar assimilation of a Nevada drugged driving statute. 734 F.3d at 893. Reed was caught speeding in Lake Mead National Recreation Area. *Id.* at 884. He admitted to smoking marijuana and imbibing alcohol while driving, and failed three of the four field sobriety tests subsequently administered. *Id.* Reed was charged, *inter alia*, under a Nevada statute that penalized the operation of a vehicle while the concentration of marijuana in the operator's blood exceeded a statutorily established limit. Nev. Rev. Stat. § 484C.110(3)(g). Above that limit, a violation of the

statute was established *per se*, i.e., without regard to actual impairment.

Reed moved to dismiss the state charge, arguing that Nevada's *per se* drugged driving law did not apply on the federal enclave where he was stopped because a federal regulation, 36 C.F.R. § 4.23(a)(1), also "prohibit[ed] operating a vehicle while under the influence of alcohol *or* drugs to a degree that renders the operator incapable of safe operation." *Id.* at 886. In other words, Reed argued that because federal law made his conduct punishable, there was no gap in federal law for state law to fill. After a magistrate judge denied Reed's motion to dismiss, Reed pleaded guilty to the state law crime and appealed to our court. *Id.* at 884.

Applying the first step of the *Lewis* test, we agreed with the trial court that the federal enactment punished Reed's conduct. *Id.* at 887. But at step two, we concluded that federal law did not preclude application of the Nevada statute. *Id.* at 888. We noted that there is no "automatic general answer" to *Lewis*'s second question and that the primary inquiry is one of legislative intent. *Id.* Although "a state statute will not be assimilated if, for example, (1) its application would conflict with federal policy; (2) it would effectively rewrite an offense definition that Congress carefully considered; or (3) the federal statutes reveal an intent to occupy so much of a field as to exclude use of the particular state statute," we concluded that "the mere presence of the federal DUI regulation [did] not manifest a federal policy against assimilating Nevada's per se drugged driving law . . . ." *Id.* at 888, 892. *Reed* observed that federal law only included a

per se provision for alcohol; it did not punish those who operated a vehicle under the influence of marijuana absent actual impairment. *Id.* at 886 (citing 36 C.F.R. § 4.23(a)(1)). Further, by providing elsewhere in the federal regulations that "State law that is now or may later be in effect is adopted and made a part of the regulations . . . [,]" 36 C.F.R. § 4.2, the National Park Service clearly expressed its intent for all nonconflicting state traffic laws to apply on federal enclaves. *Id.* at 889. Finding "no indication of an overriding federal policy with which Nevada's per se drugged driving law interferes," we affirmed Reed's convictions. *Id.* at 893.

Although Congress has never provided for the wholesale assimilation of state civil law into federal law on all federal enclaves, it has the authority to do so, and it has done so for the OCS, "an area of exclusive Federal jurisdiction." 43 U.S.C. § 1333(a)(1). In legislating for the OCS, Congress used more precise language than in the Crimes Act, specifying that applicable state law is to apply unless "inconsistent" with federal law. *Reed*, however, remains instructive in two ways. First, it reinforces that where Congress has provided for the assimilation of state law into federal law governing a federal enclave, the "mere presence" of federal law is not enough to prevent application of state law. *Reed*, 734 F.3d at 892. Second, it illustrates the principle that determining whether the presence of federal law precludes the application of state law on an enclave is primarily a question of congressional intent. *Id.* at 888-89 (citing *Lewis*, 523 U.S. at 166); *see also United States v. Souza*, 392 F.3d 1050, 1054 (9th Cir. 2004). In *Reed*, there was not only considerable overlap between the federal and state

DUI laws, but Reed's conduct was actually criminalized by existing federal law. Nevertheless, assimilating Nevada's drugged driving law was entirely consistent with federal law and policy, as the overlapping federal regulation expressly contemplated "assimilation of all nonconflicting state traffic laws." 734 F.3d at 888.

We draw a similar lesson from the jurisprudence pertaining to 42 U.S.C. § 1988(a).[16] Notably, § 1988(a) does use the term "inconsistent." But unlike the OCSLA, it requires, before the assimilation of state law, not simply that the state law be "not inconsistent with the Constitution and laws of the United States," but that "the laws of the United States [be] . . . not adapted to the object, or . . . deficient in the provisions necessary to furnish suitable remedies and punish offenses against [the] law . . . ." 42 U.S.C. § 1988(a). In other words, unlike the OCSLA, § 1988 does require a gap in federal law as a prerequisite for assimilation of state law. Taking that substantial difference into account, judicial interpretation of the term "not inconsistent" in § 1988(a) remains instructive here. In enacting the federal civil rights acts, Congress

---

[16] 42 U.S.C. § 1988(a) provides that in the event that the federal civil rights acts "are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, *so far as the same is not inconsistent with the Constitution and laws of the United States*, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (emphasis added.)

recognized that federal law would not contain every rule that may be required to adjudicate suits brought under them. *Burnett*, 468 U.S. at 47. Accordingly, in § 1988(a), "Congress determined that gaps in [the] federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law." *Hardin v. Straub*, 490 U.S. 536, 538 (1989) (footnote omitted). The Supreme Court has explained that "[i]n resolving questions of inconsistency between state and federal law raised under § 1988, courts must look not only at particular federal statutes and constitutional provisions, but also at the policies expressed in them." *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978) (alteration and internal quotation marks omitted).

An example of inconsistency between state and federal law is illustrated by *Burnett*. 468 U.S. at 55. Plaintiffs in *Burnett* were white employees of a predominantly black college who sued their employer for racial and gender discrimination after it refused to renew their contracts. *Id.* at 43-44. The district court borrowed the six-month statute of limitations for filing an employment discrimination complaint with the relevant Maryland administrative body, and dismissed the action. *Id.* at 45. The Fourth Circuit reversed, holding that Maryland's generic three-year statute of limitations applied, *id.* at 45-46, and the Supreme Court affirmed the Fourth Circuit's decision. *Id.* at 46. The Supreme Court observed that "[a] legislative definition of a statute of limitations also reflects a policy assessment of the state causes of action to which it applies." *Id.* at 52. Hence, insofar as state policies are "inconsistent with, or of marginal relevance to, the policies informing the Civil Rights

Acts," their accompanying statutes of limitations may be unsuitable for use under § 1988(a). *Id.* at 53. Contrasting the broad remedial goals of the federal civil rights statutes—"compensation of persons whose civil rights have been violated, and prevention of the abuse of state power"—to the relatively modest ambitions of Maryland's administrative scheme for employment discrimination, the *Burnett* court found Maryland's policy to be "manifestly inconsistent with the central objective of the Reconstruction- Era civil rights statutes, which is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Id.* at 53-55.

While § 1988(a) is not textually parallel to § 1333(a)(2)(A) of the OCSLA, we glean from *Burnett* and similar cases, *see, e.g.*, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the principle that inconsistency between state and federal law is assessed by looking at Congress's objective in enacting the federal statutes at issue.

c. Whether California Minimum Wage and Overtime Laws are Inconsistent with Federal Law

We thus turn to the remaining question and the crux of Newton's appeal: whether California's minimum wage and overtime laws are inconsistent with the FLSA.

The FLSA was enacted to "protect all covered workers from substandard wages and oppressive working hours." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2121 (2016) (internal quotation marks omitted). It "seeks to prohibit 'labor conditions

detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.'" *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (quoting 29 U.S.C. § 202(a)). Critical to our analysis, the FLSA "establish[es] a national *floor* under which wage protections cannot drop." *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990); *see Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 759 (9th Cir. 2010) ("[T]he FLSA sets a floor rather than a ceiling on protective legislation."), *vacated on other grounds, Chinese Daily News, Inc. v. Wang*, 565 U.S. 801 (2011). The FLSA's savings clause expressly provides that states are free to adopt more protective standards for minimum wages or maximum hours in a work week:

> No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.

29 U.S.C. § 218(a). Since "the best evidence of Congress's intent is the statutory text," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012), and the FLSA explicitly permits more protective state wage and hour laws, we reject Parker's suggestion that California's minimum wage and overtime laws are antagonistic to the remedial purposes of the FLSA simply because they establish different and more

generous benchmarks than the floor set by the FLSA's statutory and regulatory scheme.[17]

Moreover, the application of California minimum wage and overtime laws as federal law on the OCS serves the purpose of the OCSLA. In *Huson*, the Supreme Court observed that "Congress . . . recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar." 404 U.S. at 103 (internal quotation marks omitted). Application of California's minimum wage and "hours worked" provisions does not vitiate the "special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families," *Rodrigue*, 395 U.S. at 365; if anything, this policy consideration indicates that the overlapping state and federal statutory schemes regulating employment on the California shore should also

---

[17] Newton asserts that "inconsistency with regulations promulgated by departments other than the Department of the Interior does not bar the application of the state law" on the OCS. As a general matter, "properly promulgated, substantive agency regulations have 'the force and effect of law'" such as "to pre-empt state law under the Supremacy Clause." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979); *see Wyeth v. Levine*, 555 U.S. 555, 576 (2009). We have "turned to these longstanding DOL regulations in resolving FLSA . . . disputes." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 940 (2004). The OCSLA does not preclude courts from looking beyond the bare text of the FLSA to DOL regulations for illumination as to the content of existing federal law.

govern, as federal law, on the OCS.[18] Application of California's wage and hour laws also does not frustrate an interest in national uniformity, because in enacting OCSLA, Congress "specifically rejected national uniformity as a paramount goal." *Gulf Offshore*, 453 U.S. at 487 (quoting *Huson*, 404 U.S. at 104) (internal quotation marks omitted).

Parker cites numerous cases for its contention that the FLSA is inconsistent with California's minimum wage and overtime laws. In particular, Parker relies on *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015). *Mendiola* involved California wage and hour claims brought by security guards who regularly patrolled construction sites for eight hours on weekdays and sixteen hours on weekends, and who were required to reside, uncompensated, in an employer-provided trailer for eight hours after each shift and remain on-call. 60 Cal. 4th at 837. The *Mendiola* court held that these on-call hours were "hours worked" for the purposes of California's Wage Order 4, and that the employer "could not exclude 'sleep time'" from the compensable hours in the security guards' 24-hour shifts. *Id.* at 838. In reaching this result, the California Supreme Court rejected the employer's argument that federal DOL regulations furnished the appropriate definition for hours worked under California's wage order. *Id.* at

---

[18] To be clear, this "special relationship with the shore community," alone, does not support claims brought pursuant to § 1333(a)(2)(A) of the OCSLA "regardless of the location of the accident." *See Tallentire*, 477 U.S. at 218-19. This policy consideration only applies for grievances that arise on the OCS. *Id.*

842-44. Emphasizing that it had previously "cautioned against confounding federal and state labor law," the California Supreme Court ruled that the language of Wage Order 4 did not evidence the state Industrial Welfare Commission's intent to incorporate, by reference, federal law and regulations. *Id.* at 843, 847 (internal quotation marks omitted). Parker argues that *Mendiola* illustrates that California law is inconsistent with the FLSA. *See Brigham*, 357 F.3d at 940-41. We disagree. *Mendiola* only establishes that California embraces a more protective standard for determining hours worked, not that California's standard is *inconsistent* with federal law. Indeed, the savings clause in the FLSA reflects Congress's express intent that states should be allowed to adopt more protective standards. *See* 29 U.S.C. § 218(a). Parker has failed to demonstrate that California's minimum wage and overtime laws are inconsistent with federal law, and we know of nothing else indicating that California's provisions for minimum wage and maximum hours worked are inconsistent with the FLSA.

We conclude the district court erred by dismissing the claims Newton brought pursuant to California's minimum wage and overtime laws, and that California's minimum wage and maximum hours worked provisions are "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), with the FLSA. We vacate the order dismissing these claims and remand to the district court.

2. Newton's Claims under California Meal Period, Final Pay, and Pay Stub Laws

The district court dismissed the claims Newton brought pursuant to California's meal period, final pay, and pay stub laws because it concluded that state law does not apply on the OCS unless there is a "significant void or gap" in federal law, and it found that there were no such voids or gaps. In reaching this ruling, the district court relied on its conclusion that the FLSA is a comprehensive scheme, rather than considering whether California's wage and hour laws are inconsistent with the FLSA. Because we hold that the absence of federal law is not a prerequisite for applicable and not inconsistent state law to become surrogate federal law on the OCS, we vacate the order dismissing these claims. The district court shall determine on remand whether California's meal period, final pay, and pay stub laws are "not inconsistent" with existing federal law. If they are, the OCSLA adopts them as federal law on the OCS.

3. Newton's Civil Penalties and Unfair Competition Claims

Newton's claims under California's Private Attorney General Act (PAGA) and Unfair Competition Law (UCL) were dismissed by the district court on the grounds that he had not demonstrated a violation of California's labor and employment laws. Because we vacate the dismissal of Newton's other claims under California law, we also vacate the dismissal of his PAGA and UCL claims.

4. Leave to Amend

Newton's operative complaint suggests that some of Parker's allegedly unlawful conduct occurred in California. We cannot determine on the record before us whether Newton has any claim arising from the time he spent onshore or within California's territorial waters. This portion of the complaint is cryptic and it has not been addressed by the district court. Under our precedent, Newton is entitled to an opportunity to clarify these claims. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003) (observing that the rule that leave to amend shall be "freely given" is "to be applied with extreme liberality") (citing *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)).

IV. Conclusion

We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion.

VACATED and REMANDED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Filed: Apr. 27, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

---

ORDER

The Washington Legal Foundation's motion for leave to file brief as amicus curiae in support of Appellee's petition for rehearing en banc is GRANTED.

The panel votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The opinion, filed on February 5, 2018, is amended. On page 40, after the sentence, "We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion[,]" the following footnote is added: "We reserve for the district court's consideration on remand the question whether our holding should be applied retrospectively. *See Huson*, 404 U.S. at 355."

With the foregoing amendment, the petition for rehearing en banc, filed March 22, 2018, is DENIED. No further petitions for rehearing will be entertained.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

and

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

Filed: May 16, 2018

Before: Richard A. Paez, Marsha S. Berzon, and Morgan Christen, Circuit Judges

---

ORDER

Defendant-Appellee's motion to stay the issuance of the mandate is GRANTED. Issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court. If such

a petition is timely filed, the stay shall remain in effect until the petition is denied or, if granted, pending determination of the cause by the United States Supreme Court.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 15-cv-02517-RGK-AGR

BRIAN NEWTON, an individual,

Plaintiff,

v.

PARKER DRILLING MANAGEMENT SERVICES, INC.; PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Defendants,

Filed: August 10, 2015

Before: Honorable R. Gary Klausner

(IN CHAMBER) ORDER RE: DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT (DE 8)

I. Introduction

On February 17, 2015, Brian Newton ("Plaintiff") filed a putative class action against Parker Drilling Management Services, Ltd.[1] ("Defendant") in the Santa Barbara County Superior Court. On March 23,

---

[1] Defendant was erroneously sued as Parker Drilling Management Services, Inc.

2015, Plaintiff and the putative class filed a First Amended Complaint ("FAC") in state court asserting the following claims: (1) minimum wage violations; (2) pay stub violations; (3) unfair competition; (4) failure to timely pay final wages; (5) failure to provide lawful meal periods; (6) failure to pay overtime and double-time premium wages; and (7) civil penalties under the Private Attorneys General Act of 2004 (the "PAGA"). On April 6, 2015, Defendant removed the action to this Court on the basis of federal question jurisdiction pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331, *et seq.*

Presently before the Court is Defendant's Motion for Judgment on the Pleadings, or alternatively, for Summary Judgment. For the following reasons, the Court GRANTS the Motion.

II. Factual Background

Plaintiff alleges the following in his Complaint.

Defendant employed Plaintiff and the putative class, comprising over twenty-five persons, as hourly employees who worked on oil platforms in the off-shore waters in the Santa Barbara Channel. Defendant specifically employed Plaintiff from approximately January 25, 2013 to January 15, 2015. Plaintiff's shift typically lasted fourteen days during which time he could not reasonably leave the platform. However, Defendant only paid Plaintiff for twelve hours each day, which omitted the remaining twelve hours of the day that Plaintiff was present on the platform.

Plaintiff and the putative class allege the following claims under California law: (1) Defendant failed to pay the state-mandated minimum, overtime,

double-time, and meal period premium wages for all hours worked, which constitutes an unfair business practice; (2) Defendant failed to provide adequate pay stubs because they do not contain all hours and wages earned or the correct name of Plaintiff's employer; and (3) upon termination, Defendant did not timely pay all wages earned or unpaid to Plaintiff and the putative class. Among other relief, Plaintiff and the putative class seek minimum, overtime, double-time, and meal period premium wages owed with prejudgment interest pursuant to Labor Code Sections 3288 and 3289, waiting-time penalties pursuant to Labor Code Section 203, and civil penalties pursuant to Labor Code Sections 2698, *et seq.*

III. Judicial Standard

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure ("Rule") 12(c) is "functionally identical" to a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6). *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). The only significant difference is that a Rule 12(c) motion is properly brought "after the pleadings are closed—but early enough not to delay trial," whereas a 12(b)(6) motion must be filed before the answer. Fed. R. Civ. P. 12(b)-(c). In ruling on a Rule 12(c) motion, as with one under Rule 12(b)(6), a court must assume the allegations in the challenged complaint are true, and must construe the complaint in the light most favorable to the non-moving party. *See Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Dismissal is appropriate "only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory."

Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir. 2008.)

When considering a Rule 12(c) motion for judgment on the pleadings, a court may consider facts that are subject to judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999). If resolution of a Rule 12(c) motion requires consideration of facts extrinsic to the pleadings that are not judicially noticeable, a court must treat the motion as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d); *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d 1203, 1207 (9th Cir. 2007).

To prevail on a summary judgment motion, the moving party must show that there is no genuine issue of material fact as to matters upon which it has the burden of proof at trial and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). On issues where the moving party does not have the burden of proof at trial, the moving party is required only to show that there is an absence of evidence to support the non-moving party's case. *See id.* at 326. Upon such showing, a court may grant summary judgment on all or part of the claim. Fed. R. Civ. P. 56(a).

To defeat a summary judgment motion, the non-moving party may not merely rely on its pleadings or on conclusory statements. Fed. R. Civ. P. 56(e). Nor may the non-moving party merely attack or discredit the moving party's evidence. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983). The non-moving party must affirmatively present specific evidence sufficient to create a genuine issue of

material fact for trial. *See Celotex Corp.*, 477 U.S. at 324.

IV. Discussion

A. Defendant's Motion for Judgment on the Pleadings

Defendant argues that judgment on the pleadings in its favor is warranted for the following reasons: (1) the pleadings are closed; and (2) Plaintiff's claims are subject to OCSLA, which is exclusively governed by federal law unless "applicable and not inconsistent" state law is necessary to fill a "significant void or gap" in federal law. The Court agrees.

1. The Pleadings are Closed

Defendant argues that the pleadings are closed because Defendant has filed an Answer to the FAC and Plaintiff has exhausted his right to amend the Complaint once as a matter of course. The Court agrees.

The pleadings are closed for the purposes of a Rule 12(c) motion once a complaint and answer have been filed, assuming, as is the case here, that no counterclaim or cross-claim is made. *Doe v. United States*, 419 F.3d 1058, 1061 (9th Cir. 2005). Here, Plaintiff's FAC and Defendant's Answer have been filed. As such, the Court finds that the pleadings are closed for purposes of the present Motion and that the timing of Defendant's Motion is proper.

2. Plaintiff's Claims are Subject to OCSLA

The parties agree that all of Plaintiff's claims arise out of oil platforms subject to OCSLA. The purpose of OCSLA is to define a body of law applicable

to the seabed and subsoil of the "[O]uter Continental Shelf" and to the fixed structures erected thereon. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). The "[O]uter Continental Shelf" generally includes all submerged lands within the territorial waters of the United States lying more than three miles from the coast of a state. *Valladolid v. Pac. Operations Offshore*, 604 F.3d 1126, 1130 (9th Cir. 2010).

Pursuant to OCSLA Section 1333(a)(1), the law to be applied to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and installations connected to the seabed of the Outer Continental Shelf is exclusively federal. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 (1981); *see* 43 U.S.C. § 1333(a)(1); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 100 (1971). However, the law of an adjacent state may be adopted as the law of the United States to the extent that the state law is "applicable and not inconsistent" with the FLSA, regulations of the Secretary, or other federal laws. 43 U.S.C. § 1333(a)(2)(A); *see Union Oil Co. v. Oppen*, 501 F.2d 558, 560-61 (9th Cir. 1974). Such state law is only "applicable" to the extent that federal law, because of its limited function in a federal system and inadequacy to cope with the full range of potential legal problems, has a significant void or gap. *See Rodrigue*, 395 U.S. at 357; 43 U.S.C. § 1333(a)(2)(A). Therefore, under OCSLA, federal law governs and state law only applies to the extent it is necessary "to fill a significant void or gap" in federal law. *See Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969) ("[T]he deliberate choice of federal law . . . requires that 'applicable' be

read in terms of necessity—necessity to fill a significant void or gap."); *Nations v. Morris*, 483 F.2d 577, 585 (5th Cir. 1973) ("*Rodrigue* means that there must exist a gap before state law can be applicable").

Here, there are no "significant voids or gaps" in the applicability of the governing federal law, the Fair Labor Standards Act of 1938 (the "FLSA"), to the actions of which Plaintiff complains. Thus, it is not necessary to apply the law of the "adjacent state," which is California. Based on this finding, Plaintiff's contention that the FLSA's Savings Clause permits state law to concurrently govern with federal law is inapposite because it disregards OCSLA's necessity standard. The Court will first address Plaintiff's Savings Clause argument and then will address each claim in turn.

a. The FLSA's Savings Clause

Plaintiff contends that the FLSA includes a Savings Clause that allows federal and state law to concurrently regulate wage-and-hour claims in order to provide greater protection for employees. The FLSA's Savings Clause provides in relevant part: "No provision of [the FLSA] excuse[s] noncompliance with any Federal or State law . . . establishing a minimum wage higher than the minimum wage established under [the FLSA] or a maximum workweek lower than the maximum workweek established under [the FLSA]." 29 U.S.C. § 218(a). The Ninth Circuit has interpreted this clause as evidence that Congress did not intend the FLSA to preempt state wage-and-hour law. *See, e.g.*, *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1151 (9th Cir. 2000); *Pac. Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990).

While Plaintiff's contention may be true in the absence of another controlling statute governing the relationship between federal and state law, here there is such a statute—OCSLA, which requires that federal law exclusively governs unless the adoption of state law is necessary to fill a "significant void or gap" in federal law. OCSLA provides the governing standard here.

For his interpretation of the Savings Clause, Plaintiff relies on *Pacific Merchant Shipping Ass'n v. Aubry*, which held that the FLSA does not preempt California's overtime laws as applied to vessels in the Santa Barbara Channel. 918 F.2d at 1415. However, *Aubry* involved vessels that are not subject to OCSLA, and thus the court in *Aubry* did not interpret the FLSA under the OCSLA necessity standard. *See Aubry*, 918 F.2d at 1415. Therefore, *Aubry* does not control the Court's analysis here. *See Mersnick v. USProtect Corp.*, No. C-06-03993 RMW, 2006 WL 3734396, at *7 (N.D. Cal. Dec. 18, 2006) (holding that under OCSLA, "the standard for whether state law applies is necessarily more stringent [than general preemption principles] given the exclusivity of federal jurisdiction").

Furthermore, *Le Sassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), is instructive on this point. Although *Le Sassier* did not involve the FLSA, it did involve the application of federal and state law claims under OCSLA and addressed the contention that federal law does not preempt state law. *See id.* at 509. The court in *Le Sassier* held that a state law claim could not be pursued because federal law had its own comprehensive provisions relating to the claim. *Id.* at

509 (holding that there was no "gap" in federal law, and thus no authority permitting state law, where Congress provided a specific statutory provision addressing the claim). Additionally, the court found that the Supreme Court decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 724-25 (1980), holding that federal law does not preempt state law providing more generous benefits, was inapposite under OCLSA. *See Le Sassier*, 776 F.2d at 509. *Le Sassier* therefore demonstrates that ordinary preemption principles and the FLSA's Savings Clause do not govern disputes arising under OCSLA. Thus, Plaintiff's contention that the Savings Clause allows California law to govern concurrently with the FLSA fails.

b. Necessity of State Law as to Each of Plaintiff's Claims

Defendant argues that the FLSA is a comprehensive federal statute as to all of Plaintiff's claims, and thus California law is inapplicable. The Court agrees.

(1) Minimum Wage, Overtime, and Double-time Violations

Plaintiff's first and sixth claims are for minimum wage violations and failure to pay overtime and double-time premium wages under California Labor Code Sections 510, 1194, and 1197. (FAC ¶¶ 14, 59.) Sections 1194 and 1197 direct employers to compensate employees at the state-mandated minimum wage for all hours worked. Cal. Lab. Code § § 1194, 1197. Section 510 provides that eight hours of labor constitutes a day's work and provides compensation rates for work in excess of eight- and twelve-hour workdays. Cal. Lab. Code § 510(a).

However, the "FLSA provides a comprehensive scheme providing for minimum wages and overtime pay." Ann K. Wooster, J.D., *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507, § 2[a] (2004); *see Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1527 (2013) ("The FLSA establishes federal minimum-wage, maximum hour, and overtime guarantees."); 29 U.S.C. § § 206-207. Additionally, the FLSA defines "hours worked" with regard to employees who are required to be on duty for twenty-four hours or more. 29 C.F.R. § 785.22. Thus, there is no "significant void or gap" in the FLSA's coverage of Plaintiff's first and sixth claims, and therefore California wage-and-hour law is inapplicable.

(2) Failure to Provide Lawful Meal Periods

Plaintiff's fifth claim for failure to provide lawful meal periods arises under California Labor Code Sections 226.7 and 512. (FAC ¶ 49.) Section 512 provides that no employer shall employ any person for a work period of more than five hours without a meal period of not less than thirty minutes. Cal. Lab. Code § 512(a). Section 226.7 sets forth "the only compensation" for a violation of Section 512, *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal. 4th 1094, 1104 (2007), and provides that "the employer shall pay the employee one additional hour of pay . . . for each work day that the meal or rest or recovery period is not provided." Cal. Lab. Code § 226.7(b).

While the FLSA does not mandate certain rest and meal periods, it does provide for when those periods must be compensated. *Cal. Dairies, Inc. v.*

RSUI Indem. Co., 617 F. Supp. 2d 1023, 1034 (E.D. Cal. 2009). Specifically, federal regulations implementing the FLSA require that an employer compensate an employee at his regular wage for any such meal periods that are not "bona fide" as defined by 29 C.F.R. § 785.19. *Cal. Dairies, Inc.*, 617 F. Supp. 2d at 1043-44; *see* 29 C.F.R. § 785.19 (defining bona fide meal periods as non-worktime periods during which an employee "must be completely relieved from duty for the purposes of eating regular meals"). Additionally, the FLSA requires that overtime wages be paid for all "hours worked," including non-bona fide meal periods, in excess of forty hours per week. 29 U.S.C. § 207(a)(1). Moreover, the purpose behind both the California Labor Code and FLSA compensation provisions are identical, i.e., to ensure that employers provide their employees with meal and rest breaks. *See Cal. Dairies, Inc.*, 617 F. Supp. 2d at 1043.

For these reasons, the FLSA provides sufficient coverage of meal period requirements and there exists no "significant void or gap." *See id.* at 1044 (noting that even though the California Labor Code "meal and rest benefits are not identical to the FLSA, both provide some form of meal and rest benefits to be paid by, and which are entirely within the control of, the employer even if the amounts are calculated differently"). Thus, California law regarding meal periods is inapplicable.

(3) Unfair Competition

Plaintiff's third claim for Unfair Competition in violation of California Business and Professions Code Sections 17200, *et seq.* (the "UCL") is based upon Defendant's failure to pay the state-mandated

minimum, overtime, double-time, and meal period premium wages. (FAC ¶¶ 32-33.) The UCL prohibits acts of unfair competition, which include any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. As discussed above, California law regarding wages, hours, and meal periods is inapplicable. It follows then that Plaintiff's UCL claim, predicated on the violations of that same law, also fails. *See Mersnick*, 2006 WL 3734396, at *10. Additionally, Section 216 of the FLSA provides penalties for an employer's violation of the minimum wage, maximum hours, overtime, and meal-time provisions. 29 U.S.C. § 216. For this additional reason, California law is not necessary to fill a "significant void or gap" in the FLSA. Thus, California unfair competition law is inapplicable.

(4) Pay Stub Violations

Plaintiff's second claim for pay stub violations is premised on Defendant's failure to comply with Labor Code Section 226. (FAC ¶ 29.) Section 226(a) requires certain information—such as gross wages earned, total hours worked, net wages earned, and the employer's name and address—to be included on an employee's pay stubs. Cal. Lab. Code § 226(a). While the FLSA does not require employers to provide employees with pay stubs, it does require employers to keep accurate records of hours worked and wages paid to employees, among other information. *See* 29 U.S.C. § 211(c); 29 C.F.R. § 516.2; *Cal. Dairies*, Inc., 617 F. Supp. 2d at 1046. Because the FLSA prescribes recordkeeping practices which must be maintained and penalties for failure to follow its requirements, the FLSA sufficiently covers Plaintiff's second claim,

leaving no "significant void or gap." As such, California law regarding pay stub violations is inapplicable.

(5) Failure to Pay Timely Wages

Plaintiff's fourth claim for failure to timely pay final wages arises under Labor Code Sections 201 and 202. (FAC ¶ 40.) Section 201 provides that a terminated employee's wages earned and unpaid at the time of discharge are due and payable immediately upon termination. Section 202 requires that an employee's wages are due and payable within seventy-two hours after quitting his employment.

In comparison, the FLSA "'delineates administrative procedures by which covered worktime must be compensated' under federal law." *Mersnick*, 2006 WL 3734396, at *8 (quoting 5 C.F.R. § 551.101(a)). Specifically, the FLSA provides that an employer who fails to pay minimum wages and/or overtime wages is subject to a penalty equal to the amount of unpaid compensation. 29 U.S.C. § 216(b). Under the FLSA, wages are considered "unpaid unless they are paid on the employees' regular payday." *Biggs v. Wilson*, 1 F.3d 1537, 1538 (9th Cir. 1993), *cert. denied*, 510 U.S. 1081 (1994). The court in *Davis v. Maxima Integrated Products* extended the payment requirement in *Biggs* to terminated employees. *See* 57 F. Supp. 2d 1056, 1058 (D. Or. 1999) (holding that an employer's issuance of a terminated employee's final paycheck on the regularly scheduled payday, which happened to be several days after the employee left the job, comported with the FLSA).

Thus, the FLSA sufficiently addresses payment upon termination and there is no "significant void or

gap." As such, California law regarding payment upon termination is inapplicable.

(6) Civil Penalties

Plaintiff's seventh claim for civil penalties arises under the Private Attorneys General Act of 2004 ("PAGA"), which allows aggrieved employees to recover state civil penalties for violations of the California Labor Code. Cal. Lab. Code § 2699(a). However, because, as discussed above, California law is inapplicable to Plaintiff's claims, there are no civil penalties for Plaintiff to collect under PAGA. Therefore, Plaintiff fails to state a claim upon which relief can be granted.

For the above reasons, California state law pertaining to Plaintiff's claims is not adopted as surrogate federal law under OCSLA. As such, Plaintiff's claims are exclusively governed by the FLSA. Because Plaintiff brought his claims under state law, the FAC "lacks a cognizable legal theory" and fails to state claims upon which relief can be granted. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). Therefore, the Court GRANTS Defendant's Motion for Judgment on the Pleadings.

B. Defendant's Motion for Summary Judgment

Since the Court grants Defendant's Motion for Judgment on the Pleadings, it is not necessary to address the merits of Defendant's alternative Motion for Summary Judgment.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Judgment on the Pleadings.

IT IS SO ORDERED.

Appendix E

Relevant Statutory Provisions

43 U.S.C. § 1332(1)

It is hereby declared to be the policy of the United States that—

> (1) The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;
>
> * * *

43 U.S.C. § 1333(a)(1)-(2)(A)

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or

issued only under the provisions of this subchapter.

(2) (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

No. 18-389

IN THE
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. STRAUSS
Counsel of Record
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 North Fir Street, Suite F
Ventura, California 93001
(805) 641-6600
(mike@strausslawyers.com)

Counsel for Respondent

November 26, 2018

QUESTION PRESENTED

Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), all civil and criminal laws of the adjacent state become surrogate federal law on installations on the Outer Continental Shelf ("OCS"), but only "to the extent that they are applicable and not inconsistent with" applicable federal law. In the decision below, the Ninth Circuit, relying on precedent of this Court and using a test that is substantially the same as those used in OCSLA cases by the First and Fifth Circuits, held that California minimum wage and overtime laws are adopted as surrogate federal laws on the OCS because they are applicable, in that they pertain to the subject matter of the parties' dispute, and not inconsistent with potentially applicable federal laws, in that the Fair Labor Standards Act ("FLSA") permits the co-existence of state and other federal laws that provide greater minimum wage and overtime protections than the FLSA. In so holding, the Ninth Circuit rejected the district court's reliance on a 1969 maritime decision by the Fifth Circuit in *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Association*, 417 F.2d 1030 (5th Cir. 1969), which suggested in dicta that a state law would not apply on the OCS unless it was needed to fill a significant void or gap in federal law.

The question presented is:

Whether the Ninth Circuit, applying a test that is in harmony with decades-long precedent in the Supreme Court and the Fifth and the First Circuits, correctly concluded that California minimum wage and overtime laws become surrogate federal law on the OCS because they pertain to the subject matter at

hand and are not inconsistent with federal law, since the FLSA, through its savings clause, 29 U.S.C. § 218(a), expressly permits states and other federal statutes to supplement the FLSA's minimum wage and overtime laws with more protective standards.

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
INTRODUCTION 1
STATEMENT 4
I. Statutory background. 4
II. Factual background. 6
III. District court proceedings. 6
IV. Ninth Circuit proceedings. 7
REASONS FOR DENYING THE PETITION 8
I. There is no split of authority. 8
A. The Circuits to have addressed the question presented are all in agreement. 8
B. Continental Oil does not set forth the Fifth Circuit's OCSLA test in non-maritime cases. 11
II. The Ninth Circuit's decision is correct. 16
A. California wage-and-hour laws are applicable on the OCS. 16
B. California minimum wage and overtime laws are not inconsistent with federal law. 22
III. Petitioner vastly overstates the impact of the decision below. 26
IV. Employers have long acknowledged that California wage-and-hour laws apply on the platforms off its coast. 29
A. Legislative history shows that the offshore drilling industry knew California law applied to OCS platforms since 1999. 29

B. **OCS Employers' labor contracts contradict Petitioner's argument that only FLSA applies on OCS platforms.** 32

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Asgrow Seed Co. v. Winterboer,
513 U.S. 179 (1995) 17

Bartholomew v. CNG Producing Co.,
832 F.2d 326 (5th Cir. 1987) 14

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 4, 5, 17, 21

Christopher v. SmithKlien Beecham,
567 U.S. 142 (2012) 28

Collins v. Overnite Transp. Co.,
105 Cal. App. 4th 171 (2003) 29

Cont'l Oil Co. v. London Steam-Ship Owners' Mutual Insurance Ass'n,
417 F.2d 1030 (5th Cir. 1969) ..... *passim*

Dahlen v. Gulf Crews, Inc.,
281 F.3d 487 (5th Cir. 2002) 15

Diamond Offshore Drilling v. Advanced Indus. & Marine Servs., Inc.,
No. 14-00-00087-CV, 2002 WL 1411068
(Tex. App. June 27, 2002) 10

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2016) 28

F.C.C. v. Fox Television Stations, Inc.,
556 U.S. 502 (2009) 25

Fontenot v. Dual Drilling Co.,
179 F.3d 969 (5th Cir. 1999) 14

Fontenot v. Sw. Offshore Corp.,
771 So. 2d 679 (La. Ct. App. 2000) 10

Gardes Directional Drilling v. U.S. Turnkey Expl. Co.,
98 F.3d 860 (5th Cir. 1996) 16

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,
543 F.3d 256 (5th Cir. 2008) 11
Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,
589 F.3d 778 (5th Cir. 2009) 14, 16
Greer v. Services, Equip. & Eng'g, Inc.,
593 F. Supp. 1075 (E.D. Tex. 1984) 15
Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 5, 9, 18, 23
Hodgen v. Forest Oil Corp.,
87 F.3d 1512 (5th Cir. 1996) 15
In re DEEPWATER HORIZON,
745 F.3D 157 (5th Cir. 2014) 11
Integrity Staffing Sols. v. Busk,
135 S. Ct. 513 (2014) 28
Koesler v. Harvey Applicators, Inc.,
416 F. Supp. 872 (E.D. La. 1976) 13
LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 13
Milner v. Dep't of Navy,
562 U.S. 562 (2011) 20
Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 13
Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 6, 19
Olsen v. Shell Oil Co.,
708 F.2d 976 (5th Cir. 1983) 14
Pacific Operators Offshore, LLP v. Valladolid,
565 U.S. 207 (2012) 6, 19
Powell v. U.S. Cartridge Co.,
339 U.S. 497 (1950) 25
Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352, 361 (1969) 11, 15, 21, 26

Shell Oil Co. v. Iowa Dept. of Revenue,
488 U.S. 19 (1988) 4, 19, 22, 26
Smith v. Penrod Drilling Corp.,
960 F.2d 456 (5th Cir. 1992) 14
Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC,
373 F.3d 183 (1st Cir. 2004) 1, 10
Tennessee Gas Pipeline v. Houston Cas. Ins. Co.,
87 F.3d 150 (5th Cir. 1996) 12
Tetra Techs., Inc. v. Cont'l Ins. Co.,
814 F.3d 733, 738 (5th Cir. 2016) 16
Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co.,
448 F.3d 760 (5th Cir. 2006) 16
Union Texas Petroleum Corp. v. PLT Eng'g, Inc.,
895 F.2d 1043 (5th Cir. 1990) ..... *passim*
Walter Oil & Gas Corp. v. NS Grp., Inc.,
867 F. Supp. 549 (S.D. Tex. 1994) 15

STATUTES

29 U.S.C. § 206 ..... 24, 25
29 U.S.C. § 207 ..... 24, 25
29 U.S.C. § 218 ..... 2, 24, 25
33 U.S.C. § 901 13
43 U.S.C. § 1331 ..... 4, 17
43 U.S.C. § 1333 ..... *passim*
ALASKA STAT. § 23.10.060 27
ALASKA STAT. § 23.10.065 27
CAL. BUS. & PROF. CODE § 17200 7
CAL. LAB. CODE § 201 7
CAL. LAB. CODE § 202 7

CAL. LAB. CODE § 203 7
CAL. LAB. CODE § 226 7
CAL. LAB. CODE § 226.7 7
CAL. LAB. CODE § 510 ..... 7, 25
CAL. LAB. CODE § 512 7
CAL. LAB. CODE § 1182.12 25
CAL. LAB. CODE § 1194 ..... 6, 25
CAL. LAB. CODE § 1194.2 ..... 7, 25
CAL. LAB. CODE § 1197 7
CAL. LAB. CODE § 2698 7
CAL. LAB. CODE § 2699 7
CAL. LAB. CODE § 2699.3 7
CAL. LAB. CODE § 2699.5 7

OTHER AUTHORITIES

Answering Br., *Curtis v. Irwin Indus., Inc.*, No. 16-56515, ECF No. 40 (9th Cir. Feb. 23, 2018) 32

Brief for Nat'l Auto. Dealers Ass'n et al. as *Amici Curiae* on Petition for Writ of Certiorari in *Encino Motorcars, LLC v. Navarro*, No. 16-1362 28

Brief for Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* on Petition for Writ of Certiorari in *Christopher v. SmithKlien Beecham*, No. 11-20428

Collective Bargaining Agreement, *Williams v. Brinderson Constructors, Inc.*, No. 2:15-cv-02474-MWF-AGR, ECF No. 20-1 (C.D. Cal. May 22, 2015) 33

Employment Agreement, *Jensen v. Safety Equip. Corp.*, No. 2:18-cv-02890-RGK-GJS, ECF No. 28-12 (C.D. Cal. Jul. 5, 2018) 33

Indus. Welfare Comm'n, *Stmt. as to the Basis for Wage Order No. 16*.....31
Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Oct. 5, 2000).....31
Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Dec. 15, 1999).....30
Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Nov. 15, 1999).....30
U.S. Dep't of Labor, *Minimum Wage Laws in the States*.....27
U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan 2018).....26
U.S. Dep't of the Interior Minerals Mgmt. Serv., *Forecasting the Number of Offshore Platforms on the Gulf of Mexico OCS to the Year 2023* (Apr. 2001).....27

TREATISES

A. Scalia & B. Gardner, *Reading Law: The Interpretation of Legal Texts* (West 2012).....20

REGULATIONS

29 C.F.R. § 785.23.....28
ALASKA ADMIN. CODE, tit. 8, § 15.105.....28
CAL. CODE REGS., tit. 8, § 11160.....29, 30, 31

INTRODUCTION

This case involves the application of California minimum wage and overtime laws to the workers on the 23 oil platforms off the coast of Southern California on the Outer Continental Shelf ("OCS"). In the decision below, the Ninth Circuit held that California minimum wage and overtime protections extend to the workers on those platforms by virtue of the choice-of-law provision of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(a)(2)(A), which imports the non-taxation laws of the adjacent states as surrogate federal law to platforms on the OCS to the extent the state laws are "applicable and not inconsistent" with federal law. The opinion below found that these California laws were "applicable" because they pertained to the subject matter of the parties' dispute and that they were "not inconsistent" with federal law, because the state minimum wage and overtime laws provide greater protection than the minimum wage and overtime provisions of the Federal Fair Labor Standards Act ("FLSA"), which, through its savings clause, explicitly contemplates the co-existence of other state or federal laws that provide such greater protections.

The Petition should be denied for several reasons.

First, there is no circuit split. All three circuits to have addressed the issue of when a state law becomes surrogate federal law under section 1333(a)(2)(A) have adopted substantially the same test. Pet. App. 15-16; *Ten Taxpayer Citizens Grp. v. Cape Wind Assocs., LLC*, 373 F.3d 183, 194 (1st Cir. 2004); *Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043, 1047 (5th Cir. 1990) ("*PLT*").

Petitioner attempts to manufacture a circuit split by asserting that the "test" from *Continental Oil Co.*

v. London Steam-Ship Owners' Mutual Insurance Ass'n, 417 F.2d 1030 (5th Cir. 1969), is controlling in all OCSLA cases in the Fifth Circuit. *Continental Oil* discusses in dicta a standard for when a state law is "applicable" on the OCS under section 1333(a)(2)(A). *Continental Oil* does not establish the Fifth Circuit's choice-of-law test under section 1333(a)(2)(A) in non-maritime cases. Rather, the Fifth Circuit's decision in *PLT*, 895 F.2d at 1047, contains the relevant test used by the Fifth Circuit in OCSLA choice-of-law cases.

Second, the Ninth Circuit did not err in reaching its decision that California minimum wage and overtime laws are surrogate federal law on the oil platforms off the coast of Southern California. The Ninth Circuit correctly concluded that the term "applicable" in section 1333(a)(2)(A), which is not defined, must be read in its ordinary sense, i.e., that "applicable" means "pertains to the subject matter of the dispute." The Ninth Circuit also correctly determined that California minimum wage and overtime laws are "not inconsistent" with the FLSA because the FLSA contains a savings clause, 29 U.S.C. § 218(a), that permits the co-existence of state and other federal laws that provide greater minimum wage and overtime protections than the FLSA. Given that California minimum wage and overtime laws provide such greater protections, there is nothing "inconsistent" between them and the FLSA.

Third, Petitioner misstates the ramifications of the decision below. The overwhelming majority of oil platforms on the OCS are adjacent to the states that comprise the Fifth Circuit. None of those states, however, has minimum wage or overtime laws that exceed, or even differ from, the standards set by the FLSA. OCS oil production in the Ninth Circuit is

limited to the waters off the coasts of Southern California and Alaska. The opinion below will not have a significant impact on the platforms off the Alaska coast because Alaska, like the FLSA, allows for the exclusion of sleeping time from an employee's hours worked under some circumstances. Hence, the primary impact of the opinion below will be with respect to the workers on the roughly 23 oil platforms on the OCS off the coast of Southern California. As a result, the decision below impacts only a tiny fraction of United States offshore platform workers.

Fourth, Petitioner wrongly states, "Employers and employees on the OCS [have held a] shared understanding that the FLSA is the exclusive source of wage-and-hour law on the OCS," and that "employers ... relied for fifty years on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS." In fact, employers of workers on the OCS have known that California regulated the employment practices on the offshore platforms since at least 2000, when they, together with industry associations that included two of the Petitioner's *amici*, successfully lobbied for an exception to California overtime laws on those platforms. Since then, employers on the OCS, including one represented by the same counsel who represents Petitioner herein, have included language in their collective bargaining agreements and employment contracts explicitly acknowledging that California wage-and-hour laws apply to their operations.

For each of these reasons, the petition should be denied.

STATEMENT

I. Statutory background.

OCSLA extends the laws of the United States to cover the OCS and also adopts thereon all the civil and criminal laws of the adjacent states "[t]o the extent that [such state laws] are applicable and not inconsistent with [OCSLA] or with other Federal laws and regulations of the Secretary...." 43 U.S.C. § 1333(a)(2)(A).[1] Section 1333(a)(2)(A) goes on to provide: "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." *Id.* It concludes, "state taxation laws shall not apply to the outer Continental Shelf." *Id.*

Congress enacted OCSLA to resolve a dispute between "the adjacent states and the Federal Government over territorial jurisdiction and ownership of the [OCS] and, particularly, the right to lease the submerged lands for oil and gas exploration." *Shell Oil*, 488 U.S. at 26. In enacting section 1333(a), Congress's "exclusive[] concern" was prohibiting adjacent states from imposing taxes on OCS oil production. *Id.* at 29-30. To accomplish this purpose, OCSLA provides that installations on the OCS are subject to the exclusive jurisdiction and control of the federal government. *Id.* at 27; 43 U.S.C. § 1333(a)(1).

However, Congress did not intend to displace all state law as a substantive matter on the OCS. In enacting section 1333(a)(2)(A), "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 104 (1971), *disapproved of on*

---

[1] "Secretary" means Secretary of the Interior. 43 U.S.C. § 1331(b).

other grounds by Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993). As Justice Blackmun later explained:

> [T]he purpose of incorporating state law was to permit actions arising on these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law....

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 489 (1981) (Blackmun, J., concurring). Similarly, *Huson* provides that state laws apply on the OCS pursuant to section 1333(a)(2)(A), because "Congress ... recognized that the special relationship between the men working on these artificial islands and the adjacent shore to which they commute favored application of state law with which these men and their attorneys would be familiar." 404 U.S. at 103 (internal quotation marks omitted).

To harmonize these interests – control over revenues from drilling and enforcement of disputes by the federal government and the continued application of state laws with which the persons working on the OCS would be familiar – the state laws adopted on the OCS become surrogate federal law, but only if they are "not inconsistent" with other federal laws. *Huson*, 404 U.S. at 102.

In light of these concerns, the accepted interpretation of section 1333(a)(2)(A) is that the non-taxation civil and criminal laws of the states are

generally incorporated onto platforms on the OCS *unless* they are inconsistent with applicable federal law. *Shell Oil*, 488 U.S. at 25 ("Subsection 1333(a)(2)(A) begins by clarifying which laws will apply to offshore activity on the OCS. *It declares that the civil and criminal laws of the states adjacent to the OCS will apply.* Subsection 1333(a)(2)(A) goes on to create an exception to this general incorporation," i.e., state taxation laws do not apply) (emphasis added); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217 (1986) ("Within the area covered by OCSLA, federal law controls but the law of the adjacent state is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations."); *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) ("Section 1333(a)(2)(A) makes the civil and criminal laws of each adjacent state applicable to [drilling platforms on the OCS].' ").

II. Factual background.

Respondent Brian Newton worked for Petitioner on oil platforms permanently affixed to the OCS in the Santa Barbara Channel. Pet. App. 47. His shift lasted 14 consecutive days, and he received pay for only 12 hours each day while on his assigned platform. *Id.* During the 12 uncompensated hours, he was required to remain on the platform but not scheduled to work. *Id.* He could not reasonably leave the platform during any portion of his 14-day shift. *Id.*

III. District court proceedings.

On February 17, 2015, Newton filed his initial complaint against Petitioner in the Superior Court of California. Pet. App. 46. Therein, Newton alleged the following California law causes of action: (1) Minimum Wage Violations (CAL. LAB. CODE §§ 1194,

1194.2, 1197); (2) Paystub Violations (CAL. LAB. CODE § 226); (3) Unfair Competition (CAL. BUS. & PROF. CODE § 17200); (4) Failure to Timely Pay Final Wages (CAL. LAB. CODE §§ 201-203); (5) Failure to Provide Lawful Meal Periods (CAL. LAB. CODE §§ 226.7, 512); and (6) Failure to Pay Overtime and Doubletime Premium Wages (CAL. LAB. CODE § 510). Thereafter, Newton filed a First Amended Complaint adding a seventh cause of action for (7) Civil Penalties under the Private Attorneys General Act of 2004 ("PAGA") (CAL. LAB. CODE §§ 2698-2699.5). Pet. App. 47.

With respect to his overtime and minimum wage claims, Newton alleged that Petitioner failed to pay wages owed for 12 hours each workday in violation of California law. Pet. App. 3.

Petitioner removed the action to the district court pursuant to OCSLA. Pet. App. 4. Petitioner then brought a Motion for Judgment on the Pleadings, which the district court granted without leave to amend. Pet. App. 4-5. The district court held that OCSLA precluded the application of state wage-and-hour laws to offshore oil platforms. Pet. App. 52. The district court, applying a section 1333(a)(2)(A) test it derived from the Fifth Circuit in *Continental Oil*, 417 F.2d 1030, held that California wage-and-hour laws did not *apply* on the OCS because the FLSA was a comprehensive statute that had no "significant voids or gaps" in its coverage that needed to be filled by California law. *Id.* at 54-59. The district court did not address whether these laws were *inconsistent* with the FLSA. Newton appealed.

IV. Ninth Circuit proceedings.

In reversing the district court, the Ninth Circuit articulated a test that is substantially the same as those used by the First and Fifth Circuits for when

state law becomes surrogate federal law under section 1333(a)(2)(A). Pet. App. 15-16. The Ninth Circuit, reading the term "applicable" in its ordinary sense, held that California wage-and-hour laws apply on the oil platforms in federal waters off the California coast. Pet. App. 27. The court went on to hold, after analyzing the content of the potentially applicable state and federal laws and the Congressional intent behind them, that California's minimum wage and overtime laws are "not inconsistent" with the FLSA. Pet. App. 35-39. The Ninth Circuit remanded the case to the district court to consider whether Newton's other California law wage-and-hour claims were inconsistent with federal law. Pet. App. 40.

Petitioner sought *en banc* review by the Ninth Circuit. Not a single judge requested a vote on whether to rehear the matter *en banc*, but the Ninth Circuit amended its original opinion to include a direction to the district court to determine whether to apply its ruling retroactively. Pet. App. 43. Petitioner then filed a motion to stay the mandate; Respondent did not oppose it. The Ninth Circuit issued a short order staying the mandate pending the outcome of the current Petition. Pet. App. 44. Contrary to Petitioner's account, this order does not recognize any circuit split or "far-reaching consequences of its decision." Pet. 3.

REASONS FOR DENYING THE PETITION

I. There is no split of authority.

A. The Circuits to have addressed the question presented are all in agreement.

The test articulated in the decision below for when a state law becomes surrogate federal law under OCSLA is substantially the same as the test the Fifth

Circuit has used since 1990 and the test used by the First Circuit.

The Ninth Circuit's test is as follows:

> Three questions that must be asked in any case involving choice of law under § 1333(a)(2)(A) of the OCSLA. First, the threshold question is whether the situs of the controversy is the OCS. If the situs is not the OCS, the OCSLA's choice of law provision cannot apply. Second, if the situs is the OCS, then we ask whether there is any federal law applicable to the dispute. If there is not, then state law generally applies. Third, if there is federal law applicable to the dispute, then we "must consider the content of both potentially applicable federal and state law" and ask whether any applicable state law is inconsistent with federal law.

Pet. App. 15-16 (quoting *Gulf Offshore*, 453 U.S. at 486).

The test used by the Fifth Circuit is:

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (i.e. the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

PLT, 895 F.2d at 1047.[2]

The test used by the First Circuit is:

> [T]he Massachusetts statutes at issue here are available on the outer Continental Shelf in any event as surrogate federal law, provided they are not inconsistent with other applicable federal law. 43 U.S.C. § 1333(a)(2). So the critical question for this court is not whether Congress gave Massachusetts the authority to regulate on [an installation on the OCS named] Horseshoe Shoals. Rather, we must decide (1) whether the Massachusetts statutes in question apply, by their own terms, to activities on Horseshoe Shoals; and (2) if they do apply, whether their application ... would be inconsistent with federal law.

Cape Wind, 373 F.3d at 194.

Each circuit test requires that the dispute must arise on the OCS, that there is a state law that applies to the subject matter of the dispute, and that the state law must not be inconsistent with any potentially applicable federal law. Because the three circuit tests are substantially the same, there is no circuit split for this Court to resolve.

---

[2] State courts in Louisiana and Texas use the *PLT* test too. *See Fontenot v. Sw. Offshore Corp.*, 771 So. 2d 679, 685 (La. Ct. App. 2000); *Diamond Offshore Drilling v. Advanced Indus. & Marine Servs., Inc.*, No. 14-00-00087-CV, 2002 WL 1411068, at *2 (Tex. App. June 27, 2002).

B. *Continental Oil* does not set forth the Fifth Circuit's OCSLA test in non-maritime cases.

Petitioner's claim of a disagreement among the Circuits in premised on the notion *Continental Oil* sets forth the relevant test for determining when a state law becomes surrogate federal law under section 1333(a)(2)(A). It does not. Since 1990, the Fifth Circuit has used the *PLT* test to make such a determination. *See Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 543 F.3d 256, 258 (5th Cir. 2008), *on reh'g en banc*, 589 F.3d 778 (5th Cir. 2009) ("It is well settled that for Louisiana law to apply as surrogate federal law under OCSLA, the three conditions established by this court in [*PLT*] must be met.").[3]

Continental Oil, on the other hand, does not set forth the relevant test because, unlike this case, it is a uniquely maritime decision. State law cannot become surrogate federal law under section 1333(a)(2)(A) when maritime law applies of its own force. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 361 (1969). *Continental Oil* involved a collision between a vessel and a fixed drilling platform on the OCS off the coast of Louisiana, which the court described as "a classic maritime case." 417 F.2d at 1031, 1037. The platform owner filed suit against the

---

[3] The Fifth Circuit called the *PLT* test a "misfit" in *In re DEEPWATER HORIZON*, 745 F.3D 157, 166 & n.10 (5th Cir. 2014) because the dispute involved a device that was *temporarily* attached to the OCS. *Id.* at 166. Section 1333(a)(2)(A) does not adopt state law on such temporary structures. *Id.*; 43 U.S.C. § 1333(a)(2)(A). Thus, the *PLT* test may be a "misfit" when section 1333(a)(2)(A) is not implicated, but it is not a misfit where, as here, the injury arose on an OCSLA situs permanently affixed to the OCS. Pet. App. 3 (platforms here were "fixed" to the OCS).

owners of the vessel, asserting claims under Louisiana state law, which the platform owner argued became surrogate federal law under OCSLA. *Id.* at 1033. The Fifth Circuit disagreed, holding that maritime law applied of its own force to the dispute and, as a result, the Louisiana state law could not become surrogate federal law under section 1333(a)(2)(A). *Id.* at 1036.

Subsequent decisions of the Fifth Circuit have confirmed that state law cannot become surrogate federal law under section 1333(a)(2)(A) when maritime law applies of its own force. "[T]his court has declared that where OCSLA and general maritime law both could apply, the case is to be governed by maritime law." *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 154 (5th Cir. 1996). Likewise, under *PLT*'s second requirement, "for adjacent state law to apply as surrogate federal law under OCSLA ... [f]ederal maritime law must not apply of its own force." 895 F.2d at 1047. In this sense, *Continental Oil*'s holding – when maritime law applies of its own force, state law cannot apply under OCSLA – has been subsumed into the second prong of the *PLT* test.

Continental Oil opines that the term "applicable" in section 1333(a)(2)(A) should "be read in terms of necessity – necessity to fill a significant void or gap." 417 F.2d at 1036. Petitioner latches onto this phrase and incorrectly insists that it states the Fifth Circuit's OCSLA choice-of-law "test" for all cases. But *Continental Oil*'s reading of "applicable" is nothing more than dicta outside the context of maritime cases. Where maritime law applies of its own force, it does not matter whether there is a potentially applicable state law, because *Continental Oil* holds that the state

law can never displace maritime law. But where, as here, maritime law does not apply of its own force, a state law can potentially apply, and, as here, does apply. Thus, the standard for when that state law applies in non-maritime cases such as this one is not set by *Continental Oil*; rather, the well-settled standard is set by *PLT*.

Only two other Fifth Circuit decisions, one from 1973 and the other from 1985, have applied the reasoning from *Continental Oil* that certain state laws do not become surrogate federal law under OCSLA because they are not necessary to fill significant gaps in federal law. *See Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973); *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506, 509 (5th Cir. 1985) (per curiam). Both cases, which predate *PLT*, dealt with the potential application of state laws in injury actions arising under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* Although *Nations* and *LeSassier* discussed the potentially applicable state laws in light of *Continental Oil*'s definition of "applicable," their holdings rested instead on the findings that the state laws in question were inconsistent with direct counterparts in the LHWCA. *Nations*, 483 F.2d at 586, 589-590; *LeSassier*, 776 F.2d at 509-510. Indeed, courts in the Fifth Circuit have criticized those cases' reliance on *Continental Oil*'s interpretation of "applicable," because there was no reason to address the applicability of the state laws when they were clearly inconsistent with the LHWCA. *Koesler v. Harvey Applicators, Inc.*, 416 F. Supp. 872, 875, fn. 5 (E.D. La. 1976) ("Since the [LHWCA] clearly prohibits suits against fellow employees, and the [*Nations*] court held that this defense was available to the

insurer, it was not necessary to reach the question whether the [state] statute could apply generally in suits arising on the Outer Continental Shelf.").

Highlighting the fact that the definition of "applicable" in *Continental Oil*, *Nations*, and *LeSassier* is dicta is the fact that the Fifth Circuit has consistently held that a state law can become surrogate federal law on the OCS even when a comprehensive federal statutory scheme would otherwise govern. *See Olsen v. Shell Oil Co.*, 708 F.2d 976, 984 (5th Cir. 1983) (state law permitting award of pre-judgment interest in injury action became surrogate federal law despite the existence and application of federal statute that only permitted an award of post-judgment interest in such actions); *Bartholomew v. CNG Producing Co.*, 832 F.2d 326, 331 (5th Cir. 1987) (same); *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999) (state law providing for comparative negligence in injury actions applied as surrogate federal law because LHWCA did not "express[ly]" address the issue of comparative negligence). Such results would never be possible if the Fifth Circuit, relying on *Continental Oil*, prohibited a state law from applying as surrogate federal law when there is a comprehensive federal statute governing the dispute.

In addition, courts in the Fifth Circuit have recognized that the laws of the adjacent state nearly always apply under OCSLA, a conclusion that would be foreclosed if *Continental Oil* were the governing standard in all cases. *See Smith v. Penrod Drilling Corp.*, 960 F.2d 456, 460 (5th Cir. 1992), *opinion modified on denial of reh'g* (May 29, 1992), *and overruled on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir.

2009) ("As explained in *Rodrigue*, Congress intended that, after the passage of OCSLA, the oil and gas exploration industries would be governed by state law."); *Walter Oil & Gas Corp. v. NS Grp., Inc.*, 867 F. Supp. 549, 553 (S.D. Tex. 1994) ("This Court understands *Rodrigue* to indicate that state law will almost always apply under OCSLA."); *Greer v. Services, Equip. & Eng'g, Inc.*, 593 F. Supp. 1075, 1078 (E.D. Tex. 1984) (interpreting *Rodrigue* to "indicate[] that it will be the exception and not the rule when state law does not apply under OCSLA.").

The final indication that the Fifth Circuit no longer relies on the *Continental Oil* definition of "applicable" outside of maritime cases is that the Fifth Circuit adopted the *PLT* test in 1990, and that test makes no mention of that definition. Instead, *PLT* states that state law *applies* as surrogate federal law when the three requirements are met: an OCS situs, the non-application of maritime law, and non-inconsistency with potentially applicable federal law. 895 F.2d at 1047. This second prong, the non-application of maritime law, may stem from *Continental Oil*'s holding. But, other than the implicit gap left by virtue of the non-application of maritime law on the OCS platforms, the *PLT* test does not require any other type of gap in federal law for a state law to apply in non-maritime cases.

Contrary to Petitioner's contention that the Fifth Circuit uses the *PLT* test only when there is an "unquestioned gap in federal law," Pet. 19, fn. 1, the *PLT* test is the established test in all circumstances involving section 1333(a)(2)(A), including where there are potentially applicable state and federal laws. *See Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487 (5th Cir. 2002); *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1528

(5th Cir. 1996), *overruled on other grounds by Grand Isle*, 589 F.3d 778; *Gardes Directional Drilling v. U.S. Turnkey Expl. Co.*, 98 F.3d 860, 866 (5th Cir. 1996).[5] Similarly, there are decisions in the Fifth Circuit that continue to describe section 1333(a)(2)(A) as a "gap filler." *See Tetra Techs., Inc. v. Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016). But these cases do not articulate or use any "test" of applicability under section 1333(a)(2)(A) that is akin to that of *Continental Oil*, nor do they cite or mention *Continental Oil*. Rather, these cases nevertheless use the *PLT* test to determine when a state law is applicable on the OCS. *Tetra Techs.*, 814 F.3d at 738; *Texaco Expl. & Prod., Inc. v. AmClyde Engineered Prod. Co.*, 448 F.3d 760, 772, 774 (5th Cir. 2006).

Because *Continental Oil* is not the governing test in the Fifth Circuit for when a state law becomes surrogate federal law under OCSLA in non-maritime cases, Petitioner errs in relying on it here.

II. The Ninth Circuit's decision is correct.

A. California wage-and-hour laws are applicable on the OCS.

Section 1333(a)(2)(A) of OCSLA applies federal law to the OCS "[t]o the extent that [such state laws] are applicable and not inconsistent with [OCSLA] or with

---

[5] *Gardes* involved the issue of whether a Louisiana state law was inconsistent with an order from the United States Department of Interior. 98 F.3d at 862, 866-867. The Fifth Circuit used the *PLT* text in this context, holding that the state law did not "subject [the defendant] to conflicting duties" and, therefore, was not inconsistent with the department's order. *Id.* at 866-867. *Gardes* illustrates that, contrary to the assertion of *Amicus* Washington Legal Foundation, the *PLT* test applies even when maritime law is not the only potentially applicable federal law.

other Federal laws and regulations of the Secretary." In addressing whether California wage-and-hour laws applied to the work performed by Newton, the court below considered the definition of the term "applicable" as used in section 1333(a)(2)(A). Pet. App. 21. Although it defines many other terms, OCSLA does not define the term "applicable." *See* 43 U.S.C. § 1331. The court below read "applicable" in its ordinary sense to mean "pertain[s] to the subject matter at hand." Pet. App. 21. The Ninth Circuit, after analyzing the precedent of this Court and the legislative history of OCSLA, rejected Petitioner's argument that "applicable" be read according to the dicta from *Continental Oil*, i.e., a state law is only "applicable" under section 1333(a)(2)(A) if it is necessary to fill a significant void or gap in federal law. App. 22-27.

i. The ordinary meaning of "applicable" is "pertaining to the subject matter at hand."

The Ninth Circuit correctly read "applicable" in its ordinary sense – that it "pertain[s] to the subject matter at hand." This Court directs: "When terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995).

ii. The Ninth Circuit's reading of "applicable" is consistent with the precedent of this Court.

In *Huson*, the Court addressed the issue of whether a potentially applicable state statute of limitations was inconsistent with a potentially applicable federal law. 404 U.S. at 102. The Court found that the state statute was "'applicable' in federal court under the Lands Act just as it would be

applicable in a Louisiana court." *Id.* Although *Huson* did not explicitly define the term "applicable," by instead putting the term in quotations, the Court essentially gave it its ordinary meaning. That is, if the law in question were "applicable" in a Louisiana court, meaning that a litigant could bring a claim under that law in that court, then the law would be "applicable" under OCSLA. In this sense, an "applicable" law would be one that pertains to the subject matter at hand, because one can only bring claims in court that are relevant to the subject matter of a dispute.

In *Gulf Offshore*, the Court addressed the "applicable and not inconsistent" language of section 1333(a)(2)(A), also reading "applicable" in an ordinary sense. *Gulf Offshore* provides: "Our first task is to determine the source of law that will govern.... OCSLA, as discussed above, mandates that state laws apply as federal laws '[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws.' 43 U.S.C. § 1333(a)(2). *In any particular case, the adjacent state's law applies* to those areas 'which would be within the area of the state if its boundaries were extended seaward to the outer margin of the [OCS] ....'" 453 U.S. at 485-486 (emphasis added). Again, *Gulf Offshore* does not explicitly define "applicable," but its discussion of section 1333(a)(2)(A) – state law "*applies*" "in any particular case" – highlights the theme that virtually any state law that pertains to the subject matter of a dispute will be generally applicable on the OCS.

Similarly, *Shell Oil* set forth the principle that state law is "general[ly] incorporated" on drilling platforms on the OCS unless there is an exception: "Subsection 1333(a)(2)(A) begins by clarifying which laws will apply to offshore activity on the OCS. *It*

declares that the civil and criminal laws of the states adjacent to the OCS will apply. Subsection 1333(a)(2)(A) goes on to create an exception to this general incorporation." *Shell Oil*, 488 U.S. at 25 (emphasis added). The "exception" it mentions is state *taxation law*, which does not apply. *Id.*; 43 U.S.C. § 1333(a)(2)(A). In other words, the relevant (non-taxation) law of the adjacent state applies under OCSLA unless a federal law ousts it. *Id.*; *Shell Oil*, 488 U.S. at 27-28.

The two OCSLA decisions of this Court since *Shell Oil* – *Tallentire* and *Valladolid* – use the same approach. *See Tallentire*, 477 U.S. at 217 ("Within the area covered by OCSLA, federal law controls but the law of the adjacent state is adopted as surrogate federal law to the extent that it is not inconsistent with applicable federal laws or regulations."); *Valladolid*, 565 U.S. at 212 ("Section 1333(a)(2)(A) makes the civil and criminal laws of each adjacent state applicable to [drilling platforms on the OCS].' ").

None of these cases explicitly defines "applicable," but they all treat the requirement in the same way. Any state law that would be applicable in state court can be "applicable" on the OCS. Consequently, by adopting a commonsense definition of "applicable," whereby a state law would be applicable under section 1333(a)(2)(A) if it pertains to the subject matter of the dispute, the Ninth Circuit's reasoning was consistent with the precedent of this Court.

This ordinary reading of "applicable" is also consistent with OCSLA's language itself, where the words "apply," "applicable," and "application" appear numerous times in section 1333 alone. For example, section 1333(a)(2)(A) states that state taxation laws "shall not apply" to the OCS. If Congress had intended

to give the term "apply" or its derivative forms some meaning other than their ordinary definition, it could easily have done so. The statute offers no indication Congress intended these terms to have anything but their ordinary meaning.

iii. Petitioner's reading of "applicable" lacks merit.

Petitioner's suggested interpretation of "applicable," that "'applicable' be read in terms of necessity – necessity to fill a significant void or gap," Pet. 2, is erroneous for at least three reasons. First, as discussed *supra*, this phrase is taken from dicta in *Continental Oil*. 417 F.2d at 1036, which does not apply outside of maritime cases. Second, Petitioner's reading of "applicable" finds no support in the statute itself, as neither "gap" nor "void" appears in the statutory text. Instead, section 1333(a)(2)(A) states that *all* the civil and criminal laws of each adjacent state "are hereby declared to be the law of the United States" on the OCS. 43 U.S.C. § 1333(a)(2)(A). By interpreting the statutory text as requiring a gap or void in a federal statute before a state law may apply, Petitioner ignores the fundamental rule of statutory construction that "the words of a governing text are of paramount concern, and what they convey in their context is what the text means." A. Scalia & B. Gardner, *Reading Law: The Interpretation of Legal Texts* (West 2012) 441. Third, as the Ninth Circuit pointed out in the opinion below, the legislative history from which *Continental Oil* gleaned its take on the meaning of "applicable" is inconclusive, and it would be contrary to the precedent of this Court to craft a rule of law from ambiguous legislative history. *Milner v. Dep't of Navy*, 562 U.S. 562, 572 (2011).

The Ninth Circuit's definition of "applicable," which it measured against the statutory text and the precedent of this Court, was therefore correct.

Petitioner, arguing that the Ninth Circuit's conclusion was incorrect, and that a state law can only be "applicable" under section 1333(a)(2)(A) if such a law is necessary to fill a void or gap in federal law, points to the use of the term "gap" in *Rodrigue*, 395 U.S. at 357. But the term "gap" appears only once in *Rodrigue* and in a much different context than Petitioner suggests. In *Rodrigue*, there was no potentially applicable federal law *other than maritime law*. Yet maritime law did not apply to the drilling platforms under OCSLA, which left a "gap" in federal law that could be filled by the adjacent state's laws. Subsequent decisions of this Court acknowledge that *Rodrigue* used "gap" in this sense, a point that was not lost on the Ninth Circuit in the opinion below. *See Huson*, 404 U.S. at 101 ("In *Rodrigue*, we clarified the scope of application of federal law and state law under § 1333(a)(1) and § 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognized that there exists a substantial 'gap' in federal law."); Pet. App. 27.

Huson also uses the term "gap" in its analysis of whether state law becomes surrogate federal law under OCSLA. *Huson* simply holds that a potentially applicable state law is not ousted by a potentially applicable federal common law and, in such a situation, the state law becomes surrogate federal law under OCSLA. 404 U.S. at 104-105. Contrary to Petitioner's assertion, *Huson* does not address the issue of how a court must assess whether there are potentially applicable state and federal statutory schemes or whether there must be a literal "gap" in

the federal statutory scheme in order for a potentially applicable state law to apply. Thus, *Huson*'s use of the term "gap" is of little assistance here.

No decision of this Court has required a significant void or gap in federal law before the law of the adjacent state may become applicable. And a holistic reading of section 1333(a)(2)(A), which takes into account the final sentence regarding the non-application of state taxation laws, leads to the conclusion that *all* non-taxation state laws are generally incorporated on the OCS, but only to the extent they are not inconsistent with potentially applicable federal law. *Shell Oil*, 488 U.S. at 25.[6] The decision below properly read the statute in this way when it concluded that California wage-and-hour laws apply on the OCS platforms off the Southern California coast. Pet. App. 10, 21.

B. California minimum wage and overtime laws are not inconsistent with federal law.

i. The Ninth Circuit applied the correct legal standard.

Having correctly determined that California wage-and-hour laws are "applicable" under section 1333(a)(2)(A), the Ninth Circuit also correctly held that California minimum wage and overtime laws are

---

[6] By arguing that the Ninth Circuit's definition of "applicable" renders it superfluous, Pet. 28, Petitioner ignores this final sentence of section 1333(a)(2)(A) regarding the non-applicability of state taxation laws. Read as a whole, the "applicable and not inconsistent" language makes sense: all "applicable and not inconsistent" state laws become surrogate federal law on the OCS, but state *taxation* laws can never be applicable, regardless of whether they are consistent with federal laws.

"not inconsistent" with federal law. The Ninth Circuit, examining OCSLA precedent of this Court and cases that have arisen in the context of other statutes involving the incorporation of state law into federal law, "glean[ed] ... the principle that inconsistency between state and federal law is assessed by looking at Congress's objective in enacting the federal statutes at issue." Pet. App. 35.

This conclusion as to how to assess the inconsistency between potentially applicable state and federal laws under section 1333(a)(2)(A) is harmonious with the precedent of this Court. In *Gulf Offshore*, the Court faced the question of whether a state law jury instruction should have been given in a case arising on the OCS when there was a potentially applicable federal law jury instruction to the contrary. 453 U.S. at 485. After discussing the rule that, "in any particular case, the adjacent state's law applies" on the OCS, the Court turned to the issue of how to determine whether the state law was inconsistent with federal law: "To apply the statutory directive a court must consider the content of both potentially applicable federal and state law." *Id.* at 486.

Here, the Ninth Circuit complied with *Gulf Offshore*'s mandate by considering the content of the potentially available state and federal laws. Pet. App. 35-39. The opinion below additionally addressed Congress's objective in enacting the statutes at issue. *Id.* The Ninth Circuit correctly concluded that California minimum wage and overtime laws are not inconsistent with federal law under section 1333(a)(2)(A) because the federal law in question, the FLSA, specifically allows states, via its savings clause, to provide greater minimum wage and overtime protections than those set forth in the FLSA.

Pet. App. 35-36. The Ninth Circuit also correctly concluded that the importation of California minimum wage and overtime laws as federal law on the OCS serves the purpose of OCSLA. Pet. App. 36-38.

ii. Petitioner misconstrues the FLSA savings clause.

Petitioner first argues that Newton's wage-and-hour claims are inconsistent with the FLSA because "each of the state-law provisions that Newton invokes has an FLSA counterpart that regulates the same topic in a different way." Pet. 33. This argument lacks merit. The FLSA sets minimum standards for the national minimum wage and overtime hours worked. 29 U.S.C. §§ 206, 207(a)(1). In addition, the FLSA savings clause enables states, municipalities, and other federal laws to establish more favorable minimum wage and overtime legislation. *Id.* at § 218(a). The savings clause states, in relevant part: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or state law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter." *Id.*

With respect to minimum wage and overtime protections, the FLSA savings clause explicitly allows states to impose higher standards. It matters not that the state law claims here may "regulate[] the same topic in a different way" as certain provisions of the FSLA. Pet. App. 32. Rather, what matters is whether the California laws provide greater protection than their FLSA counterparts. California's minimum wage and overtime laws do provide greater protections than

their counterparts in the FLSA. CAL. LAB. CODE §§ 510, 1182.12, 1194, 1194.2; *cf.* 29 U.S.C. §§ 206, 207(a)(1). Because the savings clause permits such greater protections, the California laws are not inconsistent with the FLSA.

With respect to Respondent's other California law claims, the district court never addressed whether they were inconsistent with the FLSA, and the Ninth Circuit remanded that issue to the district court, Pet. App. 40, leaving nothing for this Court to review. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) ("This Court ... is one of final review, 'not of first view.'" (citation omitted)). In any event, nothing in the FLSA mandates or prohibits the conduct regulated by the California statutes at issue here.

iii. The FLSA savings clause even applies when there are competing federal laws.

As to Petitioner's other argument, that the savings clause does not apply when there are two inconsistent *federal* statutes, Pet. 33-34, Petitioner simply ignores the plain language of the savings clause. The savings clause expressly permits other state *or federal* laws to establish greater minimum wage or overtime protections than the FLSA. 29 U.S.C. § 218(a). This Court has rejected the argument that dueling *federal* wage-and-hour statutes could not co-exist, because the FLSA savings clause expressly permits such co-existence. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 519-520 (1950). Here, Petitioner admits that it could comply with the California-as-federal-law and FLSA standards. Pet. 34. Given that Petitioner can comply with both *federal* regimes, there is nothing stopping both such regimes from co-existing on the OCS.

iv. Applying California minimum wage and overtime laws to platforms on the OCS is not contrary to OCSLA's purposes.

Finally, the Ninth Circuit's decision is *not* "contrary to the distinctive regime that Congress established for the OCS." Pet. 34. Congress's "exclusive concern" in enacting OCSLA was the protection of revenues derived from drilling on the OCS. *Shell Oil*, 488 U.S. at 29-30. Moreover, OCSLA provides a way for federal enforcement of all laws that apply on the OCS. *Rodrigue*, 395 U.S. at 365. And, in enacting OCSLA, "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Huson*, 404 U.S. at 104. Allowing certain non-inconsistent state laws to apply as federal law on the platforms does not contravene these purposes, since OCSLA nevertheless still prohibits state taxation laws and gives federal authorities jurisdiction and enforcement rights over all disputes, whether they arise under state or federal law.

III. Petitioner vastly overstates the impact of the decision below.

The U.S. offshore oil industry is almost entirely limited to the borders of the Ninth and Fifth Circuits. In the Ninth Circuit, oil production on the OCS is almost exclusively performed off the coast of Southern California, where there are 23 platforms in federal waters. *See* U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*, p. 4-1 (Jan 2018).[7] In the Fifth Circuit, oil

[7] *Available at* https://www.boem.gov/NP-Draft-Proposed-

production on the OCS is spread evenly off the coastlines of Texas, Louisiana and Mississippi, in the Gulf of Mexico, where there are thousands of platforms. *See* U.S. Dep't of the Interior Minerals Mgmt. Serv., *Forecasting the Number of Offshore Platforms on the Gulf of Mexico OCS to the Year 2023*, pp. 1-4 (Apr. 2001).[8]

The opinion below will impact only OCS platform operations adjacent to states with minimum wage and overtime laws that provide greater protection from those provided by federal law. The states that comprise the Fifth Circuit do not have state minimum wage or overtime protections that differ from the FLSA, nor does Alabama, the one state in the Eleventh Circuit that has drilling off its coast. *See* U.S. Dep't of Labor, *Minimum Wage Laws in the States*.[9] Thus, the decision here will have no impact with respect to wage-and-hour issues in the Gulf of Mexico, where the overwhelming majority of OCS platform workers perform their jobs.

In the Ninth Circuit, the only state other than California that has drilling platforms on the OCS is Alaska. Alaska has a minimum wage that exceeds the FLSA standard, *see* ALASKA STAT. § 23.10.065, and requires overtime premiums to be paid for hours worked in excess of 40 hours in a workweek and eight hours in a workday (as opposed to the FLSA standard, which only requires overtime payments for hours worked in excess of 40 hours in a workweek), *see* ALASKA STAT. § 23.10.060. But the opinion below will

---

Program-2019-2024/

[8] *Available at* https://www.boem.gov/ESPIS/3/3104.pdf

[9] *Available at* https://www.dol.gov/whd/minwage/america.htm

not have a significant impact on the platforms off the Alaska coast because Alaska allows for the exclusion of sleeping time from an employee's hours worked under some circumstances. *See* ALASKA ADMIN. CODE, tit. 8, § 15.105 (incorporating U.S. Department of Labor regulations, including 29 C.F.R. § 785.23, that include guidelines for determining compensable hours, including hours spent sleeping).

Meanwhile, even California's offshore oil industry is extremely limited in size. Of the 23 platforms in federal waters off the coast of Southern California, several have been non-operational since 2016 and at least one is set to be decommissioned in the next few years. The number of workers on those platforms likely is fewer than 1,000.[10]

Even so, Petitioner and its fellow employers on those platforms off the California coast can retain 12-hour shifts and minimize their exposure to overtime liability if their employees elect to have alternative

---

[10] Petitioner points to *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2016), *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014), and *Christopher v. SmithKlien Beecham*, 567 U.S. 142 (2012) as examples where this Court has reversed Ninth Circuit FLSA decisions. Each of those cases had nationwide implications. This case is a minnow by comparison. *Encino Motorcars* impacted an estimated 100,000 automobile dealership service advisors. Brief for Nat'l Auto. Dealers Ass'n et al. as *Amici Curiae* on Petition for Writ of Certiorari in *Encino Motorcars, LLC v. Navarro*, No. 16-1362 at 5. *Busk*'s holding impacted every hourly employee in the country who spent time undergoing security screenings at the conclusion of their shift. *Busk*, 135 S. Ct. at 519. *Christopher* affected 90,000 pharmaceutical sales representatives. Brief for Pharmaceutical Research and Manufacturers of America as *Amicus Curiae* on Petition for Writ of Certiorari in *Christopher v. SmithKlien Beecham*, No. 11-204 at 4-5. This case impacts likely fewer than 1,000 workers off a stretch of coast no more than 200 miles long.

workweek schedules. *See* CAL. CODE REGS., tit. 8, § 11160(3)(B)(1)(h).

In short, Petitioner and its *amici* have not shown and cannot show that the decision below will impact employment conditions anywhere but for a small sliver of the Southern California coastline, making certiorari inappropriate.

IV. Employers have long acknowledged that California wage-and-hour laws apply on the platforms off its coast.

Perhaps the single largest misstatement of fact made by Petitioner and its *amici* is that the decision below "disrupts longstanding relationships among employers and employees on the OCS, who have negotiated mutually beneficial compensation plans in good faith-reliance on the shared understanding that the FLSA was the exclusive source of wage-and-hour law on the OCS." Pet. 12. Petitioner and the *amici* assert (without any evidentiary support) that employers on the OCS have believed for *50 years* that they only had to comply with the FLSA. Pet. 21-22. Not true.

A. Legislative history shows that the offshore drilling industry knew California law applied to OCS platforms since 1999.

In 1999, California enacted Assembly Bill 60 ("AB 60"). AB 60, among other things, "established a new statutory scheme governing hours of labor and overtime compensation for *all* industries and occupations." *Collins v. Overnite Transp. Co.*, 105 Cal. App. 4th 171, 176 (2003), *as modified* (Feb. 3, 2003) (emphasis in the original). In January 2001, by the promulgation of Wage Order 16-2001 pursuant to AB

60,[11] the California Industrial Welfare Commission ("IWC") began to regulate the drilling industry "for the first time." *Id.*

Between the passing of AB 60 and the promulgation of Wage Order 16-2001, the IWC held public hearings concerning the issues raised by AB 60. *Small*, 148 Cal. App. 4th at 230. Testifying at these public hearings were employers of platform workers on the OCS off Southern California and their trade organizations, even including some of the *amici*, who acknowledged AB 60's application to their industry. *See* Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Nov. 15, 1999) at 8-22[12] (testimony of *Amicus* California Independent Petroleum Association ("CIPA") seeking non-retroactive application of AB 60 to the offshore drilling industry); Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Dec. 15, 1999) at 129-129, 135[13] (representative of offshore drilling company Venoco told directly by chairman of IWC that AB 60 applied to offshore drilling industry; CIPA present at hearing). It is therefore inaccurate to now state that the industry historically believed that only the FLSA applied; the industry was on notice that California overtime laws applied offshore as early as 1999.

At that same time, recognizing that California overtime laws applied to the OCS platforms, the industry also took efforts to curb the impact of AB 60.

---

[11] Wage Order 16-2001 regulates employees in the construction, drilling, logging, and mining industries. CAL. CODE REGS., tit. 8, § 11160(1).

[12] *Available at* https://www.dir.ca.gov/iwc/PUBMTG111599.pdf.

[13] *Available at* https://www.dir.ca.gov/iwc/PublicMeeting121599.pdf

In 2000, industry representatives lobbied the IWC to adopt an alternative workweek schedule ("AWS") for offshore platform workers and their counterparts onshore. *See* Transcript of Pub. Hr'g of Indus. Welfare Comm'n (Oct. 5, 2000)[18] (testimony of representatives from *Amicus* Western States Petroleum Association ("WSPA") and company operating 12 platforms off Southern California urging the IWC to adopt same AWS for land-based facilities connected to the offshore operations as had been adopted for offshore platforms).[21]

The IWC agreed, and in Wage Order 16-2001 it adopted the same 12-hour-day AWS for onshore and offshore workers: "[F]or employees working in *offshore* oil and gas production, drilling, and servicing occupations, as well as for employees working in onshore oil and gas separation occupations directly servicing offshore operations, an alternative workweek schedule may authorize work by the affected employees of no longer than 12 hours per day within a 40 hour workweek without the payment to the affected employees of an overtime rate of compensation." CAL. CODE REGS., tit. 8, § 11160(3)(b)(h) (emphasis added).[22] Given that the oil

---

[18] *Available at* https://www.dir.ca.gov/iwc/PUBHRGo5.htm.

[21] This testimony refutes the arguments of Petitioner and its *amici* that there must be continuity of wage-and-hour laws between the workers off the California coast and workers in the Gulf of Mexico. Pet. 20. Rather, it is more important to have the offshore workers paid the same way as their onshore counterparts, because they work as a single unit and cannot be disengaged operationally.

[22] *See also* Indus. Welfare Comm'n, *Stmt. as to the Basis for Wage Order No. 16*, § 3: Hours and Days of Work, https://www.dir.ca.gov/iwc/StatementAsToTheBasisWageorder1

industry acknowledged the application of California overtime laws to its offshore drilling facilities and specifically lobbied for an AWS to reduce the impact of those laws after the passage of AB 60 in 1999, Petitioner and its *amici*, especially those *amici* who testified at the public hearings, cannot now assert that the *Newton* decision upended the industry's long-held belief that California wage-and-hour laws did not apply on the platforms.

B. OCS Employers' labor contracts contradict Petitioner's argument that only FLSA applies on OCS platforms.

Petitioner's argument that, until *Newton*, operators believed only the FLSA applied on the OCS platforms is also contradicted by the fact that most of these operators – including several who share the same counsel as Petitioner – have entered into contracts with their employees or their unions that either explicitly state that California wage-and-hour laws apply on the platforms or contain provisions that mirror those same California laws. *See* Answering Br., *Curtis v. Irwin Indus., Inc.*, No. 16-56515, ECF No. 40 at 15, 18, 19 (9th Cir. Feb. 23, 2018) (Irwin Industries' CBA, which is applicable to employees on 14 of the 23 oil platforms in federal waters off the California coast, states, "The parties to this Agreement recognize and agree that Industrial Wage Order 16-2001 covers

---

6.htm (last visited Nov. 12, 2018) ("The IWC received testimony and correspondence from employees, employers, and representatives in the drilling industry regarding alternative workweeks. Citing personal preference, family care, commuter traffic, transportation to and from offshore rigs, and mental and physical well-being, the vast majority of testimony urged the adoption of an alternative workweek permitting 12-hour days without the payment of overtime.").

[Irwin's] operation and recognize the applicability of and incorporate the provisions of Industrial Wage Order 16-2001 ... to work performed under this Agreement.");[23] Employment Agreement, *Jensen v. Safety Equip. Corp.*, No. 2:18-cv-02890-RGK-GJS, ECF No. 28-12 at 1-4 (C.D. Cal. Jul. 5, 2018) (employment agreement for work on platforms in federal waters states, "This Agreement includes ... the duties imposed on employees by law pursuant to the California Labor Code, all of which are incorporated herein by reference."); Collective Bargaining Agreement, *Williams v. Brinderson Constructors, Inc.*, No. 2:15-cv-02474-MWF-AGR, ECF No. 20-1 at 9 (C.D. Cal. May 22, 2015) (stating, "Employees are entitled to unpaid meal periods in accordance with California law and Company policy," and expressly incorporating Wage Order 16-2001 into its terms).

These documents, publicly available on PACER, flatly contradict the statement by Petitioner and its *amici* that platform operators only believed they were subject to the FLSA. Petitioner and its *amici*, on the other hand, cite to no evidence in support of their argument, further demonstrating that the Petition is misleading, lacks merit, and should be denied.

Finally, Petitioner and its *amici* argue that the decision below could impose massive retroactive liability. But the court of appeals did not make a ruling as to retroactivity, leaving that issue for the district court to address in the first instance. Pet. App. 43. This Court should not grant review because of a

---

[23] Counsel of record who signed the Answering Brief on behalf of Irwin Industries also represents the within Petitioner.

retroactivity concern when the lower courts have yet to address the issue.

CONCLUSION

The petition or a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. STRAUSS
Counsel of Record
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 North Fir Street, Ste F
Ventura, California 93001
(805) 641-6000
mike@strausslawyers.com

Counsel for Respondent

November 26, 2018

No. 18-389

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

December 11, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. The Ninth Circuit's Decision Conflicts With Fifth Circuit Precedent 2

II. The Ninth Circuit's Decision Will Have Wide-Ranging Effects On The OCS 4

III. The Ninth Circuit's Decision Is Incorrect 8

A. State Law Is Applicable Only to Fill Gaps in Federal Law 8

B. California Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bartholomew v. CNG Producing Co.,
832 F.2d 326 (5th Cir. 1987) 3

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 5, 10

Collins v. Overnite Transp. Co.,
105 Cal. App. 4th 171 (2003) 7

Continental Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) 1, 9

Dahlen v. Gulf Crews, Inc.,
281 F.3d 487 (5th Cir. 2002) 4

Fontenot v. Dual Drilling Co.,
179 F.3d 969 (5th Cir. 1999) 3

Gardes Directional Drilling v. U.S. Turnkey Expl. Co.,
98 F.3d 860 (5th Cir. 1996) 4

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 10

Hodgen v. Forest Oil Corp.,
87 F.3d 1512 (5th Cir. 1996) 4

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 2, 3

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 2

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 10

Olsen v. Shell Oil Co.,
708 F.2d 976 (5th Cir. 1983) 3

Pac. Operators Offshore, LLP v. Valladolid,
565 U.S. 207 (2012) 10

Powell v. U.S. Cartridge Co.,
339 U.S. 497 (1950) 11

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352 (1969) 9

Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 8, 10

Ten Taxpayer Citizens Group v. Cape Wind Assocs.,
373 F.3d 183 (1st Cir. 2004) 4

Statute

43 U.S.C. §1333 ..... 8, 9

Other Authorities

Exec. Order No. 13,795, 82 Fed. Reg. 20,815
(May 3, 2017) 6

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program*
(Jan. 2018) https://bit.ly/2lU8cCV 6

U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018),
https://on.doi.gov/2NOwIBc 7

REPLY BRIEF

Respondent's brief underscores the need for this Court's review. He concedes at least one circuit split, and that the workers on platforms near California will be governed by a radically different wage-and-hour regime (with their every on-platform hour compensated) from offshore workers elsewhere, and that the Ninth Circuit's OCSLA analysis is no different from ordinary preemption analysis. And his efforts to deny the depth of the circuit split or the importance of the issue are unavailing. *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Ass'n*, 417 F.2d 1030 (5th Cir. 1969), and its gap-filling/necessity analysis remain good law throughout the old Fifth Circuit. Respondent's effort to suggest otherwise cannot explain the Fifth Circuit's extant caselaw or the absence of any decision purporting to overrule *Continental Oil*, and Respondent does not even try to argue that any subsequent Eleventh Circuit decision displaces *Continental Oil*. As to importance, Respondent may be correct that there are more automobile dealers than offshore platforms, but the question of the applicable law on the OCS was sufficiently important for Congress to enact OCSLA, which even Respondent concedes was enacted in part to protect offshore drilling revenues. Thus, it is hard to imagine an OCSLA case that is more important or more deserving of this Court's review. The circuits are split, the stakes are high, and the Ninth Circuit's view that state law applies on the OCS whenever it would apply in Fresno is profoundly wrong. This Court should grant plenary review.

I. The Ninth Circuit's Decision Conflicts With Fifth Circuit Precedent.

Respondent does not dispute that the decision below is inconsistent with the Fifth Circuit's decision in *Continental Oil*, or that *Continental Oil* continues to bind the Eleventh Circuit. His attempts to cast doubt on *Continental Oil*'s vitality within the Fifth Circuit are flawed.

He first argues that *Continental Oil* governs only maritime cases, and thus would not apply to a non-maritime case like this. Opp.11-12. That bewildering contention ignores *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973), which straightforwardly applied the *Continental Oil* test in a "non-maritime" context—namely, to a platform worker's personal-injury case. *Id.* at 585. Despite that non-maritime context, the Fifth Circuit reaffirmed *Continental Oil*'s holding that "there must exist a gap before state law can be applicable," *id.*, and held that state law was inapplicable because "there is no gap—not even a tiny one," *id.* at 589.

Respondent claims that *Nations* did not turn on the meaning of "applicable," but rather on a determination that state law was "inconsistent with" federal law. Opp.13. That is obviously inaccurate. In *Nations*, the Fifth Circuit squarely held that state law was not "applicable" because "there is no gap" in federal law. 483 F.2d at 589. Indeed, the heading of the relevant portion of the opinion is: "UNNECESSARY—HENCE INAPPLICABLE." *Id.* Respondent makes a similar claim about *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), but there too, the Fifth Circuit held that "'applicable' must

be read in terms of necessity ... to fill a significant void or gap," and "such a gap does not exist in this case." *Id.* at 509.

Respondent asserts that Fifth Circuit cases have adopted state law as surrogate federal law "even when a comprehensive federal statutory scheme would otherwise govern." Opp.14. The cases he cites do not support that assertion. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), considered whether a state pre-judgment interest rule applied. The court held that it did, but only after determining that federal law was "silen[t]"on the relevant question—*i.e.*, that there was a federal-law gap. *Id.* at 984. *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987), involved the same issue and reached the same result. And *Fontenot v. Dual Drilling Co.*, 179 F.3d 969 (5th Cir. 1999), assessed whether a state-law comparative-fault rule applied to a negligence action. The court held that it did, but only after determining that the federal Longshore and Harbor Workers Compensation Act was "inapplicable" because its third-party fault provisions applied only when a vessel was involved, and none was. *Id.* at 977.

Respondent insists that the *PLT* test must have supplanted the *Continental Oil* test because the Fifth Circuit has applied it even when "there are potentially applicable ... federal laws." Opp.15. But Respondent ignores entirely the commonsense point that *PLT* was exceedingly unlikely to implicitly overrule or eviscerate *Continental Oil* when *the same judge wrote both opinions.* In all events, in the cases Respondent cites, no "potentially applicable" federal laws are apparent. *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487

(5th Cir. 2002), is a negligence case about a plaintiff who "injured his back aboard an oil platform while unloading groceries." *Id.* at 490. *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512 (5th Cir. 1996), involved "the enforceability of a standard indemnity clause." *Id.* at 1515. *Gardes Directional Drilling v. U.S. Turnkey Expl. Co.*, 98 F.3d 860 (5th Cir. 1996), addressed whether lienholders could pursue remedies against property owners. *Id.* at 865.

Continental Oil remains the binding law of the Fifth and Eleventh Circuits, and respondent does not dispute the resulting conflict with the decision below or identify any vehicle problems that would prevent this Court from resolving that conflict.[1]

II. The Ninth Circuit's Decision Will Have Wide-Ranging Effects On The OCS.

The decision below will have a substantial and harmful effect on oil-and-gas operations on the OCS, as reflected by the sizable group of companies and trade associations joining the industry amicus brief. *See* Freeport.1-2. Respondent's attempt to minimize the impact ignores the importance of the OCS to Congress, the importance of platform operations to the OCS, and the impact of applying California's anomalous wage-and-hour laws to the OCS.

---

[1] Respondent claims that *Ten Taxpayer Citizens Group v. Cape Wind Associates, LLC*, 373 F.3d 183, 194 (1st Cir. 2004), applied a test similar to the Ninth Circuit's. Opp.8-10. That would turn a 2-1 split into a 2-2 split, which would only increase the case for review. But *Ten Taxpayer* concluded that federal law "leaves no room for states to require licenses or permits for the erection of structures on the seabed." *Id.* at 196-97.

First, Respondent's attempt to minimize the universe of workers impacted by the decision below ignores the importance Congress placed on the OCS generally and applying federal law to the OCS in particular. While Respondent is no doubt correct that automobile dealerships outnumber offshore drilling platforms, that ignores that issues concerning the OCS were important enough for Congress to enact an entire statute (and for this Court to review numerous OCSLA cases). Moreover, concerns that these platforms, where people would work and sleep, have a predictable set of legal rules was at the heart of Congress' concerns. And, as Respondent himself highlights, Congress was specifically concerned with protecting the revenues of offshore operations. While the immediate concern was precluding state-law taxation, state laws forcing compensation for every hour (waking or unwaking) pose an equal threat to offshore revenues. Thus, this case implicates Congress' core concerns in enacting OCSLA, and, given the circuit split and financial stakes, it is as consequential as any OCSLA case this Court is likely to see. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 98-99 (1971) (addressing statutes of limitations under OSCLA for "injuries occurring on fixed structures on the [OCS]").

Furthermore, Respondent's suggestion that this case affects only members of drilling crews on 23 platforms near California is flawed. Opp.26. To begin with, the decision below affects not just drilling crews, but also the employees of the numerous contractors providing a variety of services on platforms, including transportation, maintenance, repairs, surveying, food

service, and cleaning. *See* Freeport.16-17.[2] Additionally, the decision below applies to the extensive drilling activity off the coast of Alaska, and although Respondent suggests that Alaska law mirrors federal law in *some* respects, he ultimately admits (as he must) that Alaska applies a distinct hours-per-day test for overtime, Opp.27-28, which is a misfit on the OCS, *see* Chamber.5 n.3.

Moreover, the scope of OCS activity, and the importance of a clear and predictable legal regime, will only increase. The federal government recently emphasized that it is "the policy of the United States to encourage energy exploration and production ... on the" OCS. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (May 3, 2017). Its most recent proposal "would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019–2024 period," including areas off the coast of *every* coastal State. *See* U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* (Jan. 2018) at 1, 8-9, https://bit.ly/2lU8cCV; *see also* Freeport.18, 23-24 (emphasizing importance of uniform federal rules to facilitate this expansion). Similarly, the federal government recently announced that over 1,000 square miles of the OCS off the

---

[2] Respondent suggests that platform operators can adopt "alternative workweek schedules" under California law. Opp.28-29. But no definition of "workweek" could relieve employers from the California-law requirement to pay for all hours (including sleep) spent on the platform. Since it is impractical and unsafe to ferry workers back to shore every day, California's alternate-workweek law does not solve the problem presented here.

California coast may be made available for offshore wind farms. *See* U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018), https://on.doi.gov/2NOwIBc.

Respondent claims that employers were on notice that California law applied on the OCS, citing 1999 legislative hearings. Opp.29-32. But those hearings did not address the OCS. In 1999, California enacted sweeping legislation that extended an hours-per-day overtime test to drilling industry employees, most of whom worked *on*shore or in *state* "offshore" waters landward of the OCS. *See Collins v. Overnite Transp. Co.*, 105 Cal. App. 4th 171, 176 (2003). Industry representatives sought an industry-specific wage order to address their *on*shore and state-jurisdictional "offshore" operations, not because the legislation would supplant federal law on the OCS.

Respondent touts that some collective bargaining agreements between OCS employers and employees incorporate state-law standards. Opp.32-33. But CBAs are free to incorporate any law the parties want, whether from the adjacent state, another state, or federal law. And whatever law is adopted is a product of bargaining, not Sacramento's fiat. Parties are free to accept some aspects of state law (say, wage rates) but not others (say, rules requiring compensation for every on-platform hour). In all events, parties should be able to negotiate against a default rule that is clear and uniform, not one that applies state law in the Ninth Circuit and federal law in the Fifth and Eleventh Circuits.

Ultimately, Respondent cannot deny the reality that, absent review, workers off the California coast

will enjoy a radically different wage-and-hour regime than those off the Gulf Coast. Companies operating in both venues will have to deal with one set of employees entitled to round-the-clock compensation while the balance are subject to the FLSA's more sensible approach. If the Ninth Circuit is correct, then employers will have no choice but to adjust. But employers should not be forced to deal with this massive disruption to their compensation practices without this Court's review.

III. The Ninth Circuit's Decision Is Incorrect.

Respondent's efforts to defend a Ninth Circuit regime where all state law presumptively applies to the OCS (without regard to any gap in federal law) and is inconsistent with federal law only if preempted are unavailing.

A. State Law Is Applicable Only to Fill Gaps in Federal Law.

Respondent's arguments are premised on an imagined *status quo ante* in which state law reigned unquestionably supreme on the OCS, and OCSLA reflected a modest effort to nudge state law aside in limited circumstances principally concerning taxation. *See, e.g.*, Opp.4 ("Congress did not intend to displace all state law as a substantive matter on the OCS.").[3] In reality, OCSLA was Congress' first (and

---

[3] Respondent cites *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19 (1988), for the proposition that OCSLA's "exclusive[] concern" "was prohibiting adjacent states from imposing taxes on OCS oil production." Opp.4; *see* Opp.26. In reality, *Shell Oil* explained that prohibiting direct state taxation was the "exclusive[] concern" of *one sentence* of §1333(a)(2)(A), 488 U.S. at 29-30. The principal concern of OCSLA as a whole "was to define

only) effort to establish the applicable law on the OCS, and it unequivocally made federal law "exclusive," with state law never applicable of its own force and "used only" as the basis for a federal rule of decision "to supplement federal law." *Rodrigue*, 395 U.S. at 358-59. Congress *rejected* proposals that would have treated the OCS as if it were part of the adjacent state, deciding *against* "supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036. Respondent nonetheless never denies that the Ninth Circuit has embraced the exact same choice-of-law regime that Congress rejected. *See* Pet.28, 34.

The problems with Respondent's (and the Ninth Circuit's) view do not end there. As the Fifth Circuit highlighted in *Continental Oil*, Respondent's interpretation would render the word "applicable" superfluous, with the only inquiry focusing on whether state and federal law were inconsistent. Pet.28. Respondent's feeble effort to brush away that significant concern is tellingly buried in a footnote. *See* Opp.22 n.6. He claims that Congress included the word "applicable" only to avoid confusion between OCSLA's basic choice-of-law provision and a subsection providing that "State taxation laws shall not apply to the outer Continental Shelf," §1333(a)(2)(A). That is fanciful. No one could possibly be confused by the words "shall not apply," and Congress' effort to supply a general choice-of-law rule should not be distorted (in a pro-state-law direction)

---

a body of law applicable to the [OCS]," namely, "federal law." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355-56 (1969).

by a provision making clear beyond cavil that state law should not apply in one context.

Respondent claims that §1333(a)(2)(A) "states that *all* the civil and criminal laws of each adjacent state 'are ... declared to be the law of the United States.'" Opp.20. But the statute does not say that; it says that state laws become surrogate federal law only "[t]o the extent that they are applicable and not inconsistent with" federal law. §1333(a)(2)(A). The difference is fundamental. The former would amount to the regime Congress rejected; the latter is consistent with a regime where all law is federal but state law provides the rule of decision on subjects not independently addressed by federal law.

Respondent asserts that this Court has used the term "applicable" in a manner consistent with the decision below. Opp.17-19. That is incorrect. In *Huson*, a personal-injury case, everyone agreed that "there exists a substantial 'gap' in federal law." 404 U.S. at 101. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the language respondent cites addresses only the distinct question of which state is "adjacent." *Id.* at 485-486. Respondent's other citations are even further afield. *See Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012) (interpreting §1333(b), not §1333(a)); *Shell Oil*, 488 U.S. at 32 (states can include OCS-derived income in tax base); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220 (1986) (OCSLA inapplicable).

Finally, respondent claims that "[n]o decision of this Court has required a significant void or gap in federal law before the law of the adjacent state may become applicable." Opp.22. But that is exactly what

this Court held in *Rodrigue*. *See* Pet.24-25. The decision below thus conflicts not only with Fifth and Eleventh Circuit precedent, but also with this Court's precedent.

B. California Wage-and-Hour Laws Are Inconsistent With the FLSA for OCSLA Purposes.

Respondent doubles down on the Ninth Circuit's fundamentally misguided view that state law is not "inconsistent" with federal law for OCSLA purposes so long as it would not be preempted. But that view treats the OCS no different from Fresno and injects federalism considerations into a context (the OCS) where they are fundamentally misplaced. To all this, Respondent has no answer.

Nor does he dispute that California law differs from the FLSA on almost every major subject covered by wage-and-hour law: hours worked, sleep time, overtime, minimum wage, employee status, and more. *See* Pet.32-34; Chamber.3-8. He nonetheless insists that California law is "not inconsistent with" the FLSA because the latter has a savings clause. Opp.22-26. But the FLSA includes a savings clause for the entirely applaudable reason of accommodating States' primary and plenary authority to regulate working conditions within their own jurisdictions, not to facilitate a regime of duplicative and inconsistent regulations on the exclusive federal enclave that is the OCS.

Respondent points out that the savings clause preserves "*federal* legislation affecting labor standards," like the Portal-to-Portal Act. *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 518 (1950) (emphasis

added). Respondent thus ambitiously argues that after California law becomes surrogate federal law under OCSLA, it is preserved by §218's reference to federal law. Opp.25. That puts the cart before the horse: state law becomes surrogate federal law only *after* a court determines that it is applicable and not inconsistent with federal law. Moreover, Congress could save other federal laws because it was unlikely to enact flatly contradictory laws on the exact same issue. The Portal-to-Portal Act, for example, addressed a specific concern with massive retroactive liability (a concern implicated by the decision below) without otherwise repealing any federal law. If, however, Congress first passed a federal law *not* requiring compensation for sleeping hours and then enacted a second law requiring compensation for those same sleeping hours, the laws could only be understood as inconsistent, with the latter implicitly repealing the former. So too if California wage-and-hour law were treated as federal law, which is why it is "inconsistent with" the FLSA for OCSLA purposes and inapplicable to the OCS. The Ninth Circuit's contrary ruling is deeply flawed and should be reviewed and reversed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

December 11, 2018

No. 18-389

In The Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

The Ninth Circuit's Decision Disrupts Settled Compensation Arrangements By Replacing Federal Law With Flatly Inconsistent, Outlier State-Law Rules. 3

A. The New Wage-and-Hour Law that the Ninth Circuit Engrafted from California Is a Major Departure from the FLSA. 3

B. The Ninth Circuit's Decision Creates Unanticipated Liabilities and Disrupts Established Compensation Arrangements for Employers Who Complied with the FLSA..... 9

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Alvarado v. Dart Container Corp. of Cal., 411 P.3d 528 (2018) 8

Christopher v. SmithKline Beecham Corp., 567 U.S. 142 (2012) 12

Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n, 417 F.2d 1030 (5th Cir. 1969) ... 2, 9

Dynamex Operations West, Inc. v. Superior Court, 416 P.3d 1 (Cal. 2018) 7

Encino Motorcars LLC v. Navarro,
138 S. Ct. 1134 (2018) 11
136 S. Ct. 2117 (2016) 11, 13

Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (2014) 12

Mendiola v. CPS Security Solutions, Inc., 340 P.3d 355 (Cal. 2015) 4

Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) 9

Schultz v. Capital Int'l Security, Inc., 466 F.3d 298 (4th Cir. 2006) 7

Troester v. Starbucks Corp., 5 Cal. 5th 829 (Cal. 2018) 6

United States v. Darby, 312 U.S. 100 (1941) 3

STATUTES

29 U.S.C.

§ 206(a)(1)(C) 6

§ 207(a)(1) 4

§ 213(b)(10)(A) 11

§ 218(a) 9

43 U.S.C.

§ 1333(a)(1) 9

§ 1333(a)(2)(A) 9

Cal. Lab. Code

§ 201(a) 8

§ 510(a) 4

§ 510(a)(2) 4

§ 514 4

§ 515(e) 5

§ 1182.12(b)(1)(B) 6

REGULATIONS

29 C.F.R.

§ 541.200(a) 5

§ 785.23 4

§ 785.47 6

8 Cal. Code Regs.

§ 11040 5

OTHER AUTHORITIES

U.S. Dep't of Labor, Last Paycheck 8

U.S. Dep't of Labor, Minimum Wage Laws in the States 5

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program (Jan. 2018) 10

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes businesses engaged in commerce in each of the 50 states, including offshore enterprises in states adjacent to the continental shelf. The Chamber therefore has a keen interest in ensuring that those members' long-standing employer-employee arrangements—adopted to suit unique working conditions based on well-settled law making the Fair Labor Standards Act the sole regime governing wage-and-hour rules on the continental shelf—are not abruptly upended by the Ninth Circuit's countertextual and ahistorical interpretation of the Outer Continental Shelf Lands Act.

---

[1] Counsel of record for all parties received timely advance notice of the intent to file this brief and consented to the filing of the brief. S. Ct. R. 37(2)(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

As explained in the petition (Pet. 14-20), the Ninth Circuit's decision created an irreconcilable conflict with the Fifth Circuit's holding (and, by extension, the Eleventh Circuit's) that state law is borrowed to govern the outer continental shelf only if there is a gap in the coverage of federal law. *See Cont'l Oil Co. v. London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969). And such a coverage gap plainly does not exist for the comprehensive Fair Labor Standards Act (FLSA). That stark divide in appellate authority among the circuits covering virtually all offshore operations within the United States alone warrants review by this Court.

And the Ninth Circuit decision creates this conflict on a nationally significant legal question that requires timely resolution by this Court. Employers require settled law to make business decisions in setting up compensation schemes. For decades, the offshore industry relied upon a shared understanding—never questioned until now—in structuring standard compensation and staffing practices in accordance with the FLSA. The Ninth Circuit's decision upended those expectations because it imported into federal law a set of rules radically inconsistent with the FLSA. Complying with California-law-as-federal-law is not a matter of simply increasing a few wages or covering a few more employees with overtime pay. It would require a wholesale restructuring of compensation and hours, from the length of shifts to the number of days a worker is posted offshore.

This substitution of inconsistent state law for duly enacted, comprehensive federal law is contrary to the text and purpose of the Outer Continental Shelf Lands Act. And its disruptive consequences—threatening liability for employers who have undisputedly, and in good faith, complied with the FLSA—demand this Court's intervention now, as it has done in other cases when a divergent court of appeals' decision threatened to undo long-standing industry employment arrangements.

ARGUMENT

The Ninth Circuit's Decision Disrupts Settled Compensation Arrangements By Replacing Federal Law With Flatly Inconsistent, Outlier State-Law Rules.

A. The New Wage-and-Hour Law that the Ninth Circuit Engrafted from California Is a Major Departure from the FLSA.

The California wage-and-hour law that the Ninth Circuit imported into federal law to govern the outer continental shelf regulates differently than actual federal law—the FLSA—on virtually every subject covered by the FLSA's "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941).

Starting with a provision of particular relevance to the outer continental shelf, and likely the motivating factor behind this lawsuit, California rules for counting hours worked are inconsistent with the FLSA. Specifically, "[a]n employee who resides on his employer's premises on a permanent basis or for

extended periods of time is not considered as working all the time he is on the premises" under the FLSA, and reasonable agreement of the parties regarding compensable time will be accepted. 29 C.F.R. § 785.23. In California, however, personnel residing on an employer's premises must be paid for all hours on call, including those "engaged in personal activities, including sleeping, showering, eating, reading, watching television, and browsing the Internet." *Mendiola v. CPS Security Solutions, Inc.*, 340 P.3d 355, 361 (Cal. 2015). In so holding, the California Supreme Court acknowledged that applying the FLSA regulation would mandate a different result, but rejected the federal approach. *Id.*

But the differences go far deeper, and are much more disruptive to long-standing employment and compensation arrangements, than that. For example, overtime requirements under California law are very different from the FLSA. The FLSA imposes a workweek standard, generally requiring employers to pay time and a half for any hours worked in excess of 40 hours in a week. 29 U.S.C. § 207(a)(1). In California, however (and now on parts of the outer continental shelf), overtime must be paid, *inter alia*, at time and a half for any hours exceeding eight in a day and for the first eight hours of the seventh straight day of work, and at double time for any work beyond the first eight hours of the seventh day or in excess of 12 hours on any single day. Cal. Lab. Code § 510(a).[2]

---

[2] Certain workers covered by collective bargaining agreements are exempt from these rules. Cal. Lab. Code §§ 510(a)(2), 514.

The hours-per-day and days-per-week tests under California law—which are outlier provisions shared in some form by only two to three other states and Puerto Rico, *see* U.S. Dep't of Labor, Minimum Wage Laws in the States,[3] have obvious disruptive implications for work that is often structured into tightly grouped days of 12-hour shifts, given the need to ferry employees to and from offshore platforms, *see* Pet. App. 3 (describing Respondent's 12-hour shifts and 14-day "hitches"). Making things more complicated still, California law requires employers to pay overtime to employees who are exempt under the FLSA. *E.g.*, *compare* 29 C.F.R. § 541.200(a) (2015) (exempting administrative employees whose primary duty "includes" qualifying exercise of discretion if the employee's salary exceeds $455 per week), *with* Cal. Lab. Code § 515(e), 8 Cal. Code Regs. § 11040 (requiring salary of more than $880 per week and "more than one-half of the employee's worktime" to be comprised of qualifying tasks to be exempt as an administrative employee).

---

[3] *Available at* https://www.dol.gov/whd/minwage/america.htm. Alaska, Colorado, Nevada, and Puerto Rico share some variation on the hours-per-day test. *Id.* Kentucky and Connecticut have some variation on the rule requiring overtime for the seventh straight day of work, at least in certain industries. *Id.* No state other than California has both an hours-per-day and a days-per-week test, and no state requires double time for hours exceeding eight on the seventh day of work, as California does, with huge potential impact for unique offshore working conditions.

Beyond overtime, the most basic requirement of wage-and-hour law—the minimum wage itself—is different. The FLSA requires a $7.25 minimum wage, 29 U.S.C. § 206(a)(1)(C), and California law requires $11 (for larger employers), Cal. Lab. Code § 1182.12(b)(1)(B). [4] And the differences between federal and California law extend to even the smallest amounts of work. *Compare* 29 C.F.R. § 785.47 ("de minimis" rule providing that "insubstantial or insignificant periods of time beyond the scheduled working hours, which cannot as a practical administrative matter be precisely recorded for payroll purposes, may be disregarded"), *with Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (Cal. 2018) (rehearing denied and order modified on Aug. 29, 2018) (holding that "the federal de minimis doctrine" does not apply in California, and employer must track and compensate time spent on regularly occurring post-clock-out tasks like locking a door and setting an alarm, but leaving open possibility of de minimis rule under California law for uncommon circumstances).

Finally, California not only regulates hours, wages, and overtime differently than the FLSA—it also regulates who counts as an employee in a completely different way. Under the FLSA, employee status (versus classification as an independent contractor) depends upon the "economic reality" of

---

[4] Given the unique working conditions and related compensation structures for most workers on the outer continental shelf—now put at risk by the Ninth Circuit's decision—the majority of such workers have historically made far more than minimum wage. *See* Pet. App. 20 (noting Respondent was paid "well above the state and federal minimum wage").

whether the worker is dependent upon the hiring business or in business for himself, as determined by multiple factors, including the employer's "degree of control ... over the manner in which the work is performed," the worker's "opportunities for profit or loss," the worker's skill, the worker's investment in equipment, "the permanence of the working relationship," and "the degree to which the services rendered are an integral part of the putative employer's business." *Schultz v. Capital Int'l Security, Inc.*, 466 F.3d 298, 304-05 (4th Cir. 2006) (citing *United States v. Silk*, 331 U.S. 704 (1947)).

Under California law, however, a newly minted test for employee status may sweep in many more workers who, under long-settled federal law, otherwise would qualify as independent contractors. *See Dynamex Operations West, Inc. v. Superior Court*, 416 P.3d 1, 34-35 (Cal. 2018) (rejecting the "federal economic reality" test). The California test starts from a mistaken presumption that all workers are employees. *Id.* at 34. It then requires any business to rebut that presumption by proving each of three required factors: the worker is free from the control and direction of the hiring entity, the worker performs work that is outside the usual course of the hiring entity's business, and the worker is customarily engaged in an independently established occupation or business of the same nature as the work performed. *Id.* at 35. Like many aspects of California wage-and-hour law, this approach is an outlier, and is applied in only one other state. *Id.* at 34 n.23 (noting that California was adopting a test applied only in Massachusetts).

California law is thus inconsistent with the FLSA (and most other states' laws) on every major topic covered by a wage-and-hour law: wages, hours, overtime, and employee status. And these are not the only inconsistencies between the FLSA and California wage-and-hour law. From the most fundamental principles to the most minute detail, the differences are legion. *See, e.g.*, *Alvarado v. Dart Container Corp. of Cal.*, 411 P.3d 528, 538 (2018) (rejecting FLSA rules on how to address bonuses when calculating overtime in favor of rule generating higher overtime pay); *compare* U.S. Dep't of Labor, Last Paycheck (employers "not required by federal law to give former employees their final paycheck immediately"),[5] *with* Cal. Lab. Code § 201(a) (requiring final wages to be paid immediately at the time of termination in most circumstances).

In sum, substituting California wage-and-hour law for federal law on the outer continental shelf, as the Ninth Circuit's decision does, is not a matter of introducing a few small contradictions into federal law, and much less is it interstitial gap-filling. Rather, imposing California's outlier wage-and-hour law in the federal outer continental shelf enclave represents the wholesale replacement of long-settled and uniform federal wage-and-hour law with a dramatically different regulatory scheme. As argued in detail by Petitioner, Pet. 32-34, such blanket displacement of a comprehensive federal scheme cannot be squared with the text and intent of the Outer Continental Shelf

---

[5] *Available at* https://www.dol.gov/general/topic/wages/lastpaycheck.

Lands Act, which adopts state law as federal law only if, *inter alia*, it is "not inconsistent" with governing federal law. 43 U.S.C. § 1333(a)(2)(A).

There is no basis in federalism or federal preemption principles for a savings clause designed to preserve state authority within state jurisdiction, 29 U.S.C. § 218(a), to elevate a body of law borrowed from one state—and an outlier state, at that—over duly enacted federal law and regulations on the outer continental shelf, where there is no state sovereign authority or jurisdiction whatsoever, 43 U.S.C. § 1333(a)(1). This Court's review of the Ninth Circuit's conclusion to the contrary is critical to forestalling the immediate and hugely disruptive consequences of imposing an unforeseen—and unforeseeable—contradictory wage-and-hour regime on employers in part of the outer continental shelf.

B. The Ninth Circuit's Decision Creates Unanticipated Liabilities and Disrupts Established Compensation Arrangements for Employers Who Complied with the FLSA.

For nearly 50 years, based on the shared understanding that the comprehensive federal law provided by the FSLA alone governed compensation in the outer continental shelf, employers have relied upon this settled choice-of-federal-law rule in designing compensation arrangements in compliance with the FLSA. *See Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Cont'l Oil*, 417 F.2d 1030. Such compensation schemes, often the product of collective bargaining, include unique (and often highly

remunerative) compensation structures well-suited to off-shore work, such as the 14-days-on, 14-days-off schedule Respondent worked, and a shift system that provided for employees' sleeping time to be excluded from compensation. *See* Pet. 9, 20-21; U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., 2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program, p. 8-4 (Jan. 2018) (estimating that oil and gas workers earn more than 150% of the average hourly wage of other employees).[6]

In a pen stroke, the Ninth Circuit's decision upended that settled understanding, put employers at risk of substantial retroactive liability for California law violations—despite uncontested compliance with the FLSA—and disrupted critical industry staffing and compensation practices. What's more, the decision throws company-wide employment arrangements (including collectively bargained agreements) into disarray as employers must now follow different rules between their offshore operations in the Gulf of Mexico and their operations offshore of states falling within the Ninth Circuit. *See* Pet. 20. Worse still, the rules employers must follow within the Ninth Circuit are splintered further by each state's laws—the vast majority of which are very different from California's, as described above.

This Court has recognized the importance of protecting well-settled industry compensation practices from abrupt and unwarranted shifts in wage-and-hour rules. And the Court has not hesitated

---

[6] *Available at* https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

to intervene when a court of appeals—not infrequently the Ninth Circuit—issued a decision in conflict with other courts of appeals that cast doubt on long-standing employer-employee arrangements. It should do the same here.

For example, in *Encino Motorcars LLC v. Navarro*, 138 S. Ct. 1134 (2018) (*Encino II*), the Court granted certiorari to review—and ultimately reverse—the Ninth Circuit's interpretation of the FLSA excluding automobile service advisors from the overtime exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles ...." 29 U.S.C. § 213(b)(10)(A). The Court's rejection of the Ninth Circuit's interpretation followed its earlier repudiation of the Ninth Circuit's deference to a procedurally invalid regulation that "undermined significant reliance interests in the automobile industry by changing the treatment of service advisors without a sufficiently reasoned explanation." *Encino II*, 138 S. Ct. at 1139 (describing *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016) (*Encino I*)). As *Encino I* explained, before the Ninth Circuit's decision (and the invalid regulation on which it was initially based), "[d]ealerships and service advisors negotiated and structured their compensation plans against this background understanding" that service advisors were exempt, and the position ultimately taken by the Ninth Circuit (and rejected by the Court) "could necessitate systemic, significant changes to the dealerships' compensation arrangements." 136 S. Ct. at 2126. Such drastic changes with far-reaching economic

consequences cannot be imposed without a clear Congressional mandate.

Likewise, in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), the Court emphasized the importance of settled compensation practices in rejecting a court of appeals' minority view requiring overtime pay for certain pharmaceutical sales representatives under the FLSA. There, too, the Court emphasized that the industry had a "decades-long practice of classifying pharmaceutical detailers as exempt employees," supported by decades of acquiescence by the Department of Labor and the clear language of the statute and regulations. *Id.* at 157; *see also Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 518 (2014) (reversing Ninth Circuit's interpretation of FLSA in favor of an interpretation that was "fully consistent with an Opinion Letter the Department [of Labor] issued in 1951"). Furthermore, the Court reasoned, concurring in the court of appeals' interpretation would constitute an "unfair surprise," and make it "challenging, to say the least, for pharmaceutical companies to compensate detailers for overtime going forward without significantly changing the nature of that position." *Christopher*, 567 U.S. at 158, 166.

So, too, here—in spades. The turmoil caused by the Ninth Circuit's unilateral imposition of California law to displace federal law, on federal land, surpasses the disruption in the cases where the Court has seen fit to intervene before. Unlike *Encino Motorcars* and *Christopher*, far more than a shift in overtime obligations for a single profession is at stake here. Instead, the Ninth Circuit's decision instantly altered

virtually every single compensation rule governing every kind of worker on the continental shelf, given the major differences between California law and the FLSA (and the rules applicable under most other states' laws).

Adding insult to injury, unlike those other cases—which involved at least arguably unclear provisions of the FLSA and related regulatory shifts—there is no dispute here that offshore employers fully complied with the FLSA's commands. Subjecting them to potentially massive liability based on the imposition of a body of law that they could not have possibly foreseen would apply—and one that radically differs from the rules that all parties understood to govern, to boot—would be an unfair surprise, indeed.[7] And it would, of necessity, require substantial changes to decades-old compensation and staffing practices that are eminently suited to offshore work. There is no basis in the text, structure, or history of the Outer Continental Shelf Lands Act for this topsy-turvy outcome. This Court's review is urgently needed to protect employers' settled expectations and long-standing industry practices.

---

[7] The need for review is not lessened because the Ninth Circuit—in response to the petition for rehearing en banc—left the possibility open that employers *might* escape retroactive liability. Pet. App. 43. That was so in *Encino I* as well, but—as the Court noted—did not lessen the stakes for employers who faced the risk of "substantial ... liability." 136 S. Ct. at 2126.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted.

Steven P. Lehotsky
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

October 26, 2018

No. 18-389

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FREEPORT-MCMORAN OIL & GAS LLC, AMPLIFY ENERGY CORP., BETA OPERATING COMPANY, LLC, DCOR, LLC, ENSIGN UNITED STATES DRILLING (CALIFORNIA), INC., ARDENT COMPANIES, INC., AMERICAN PETROLEUM INSTITUTE, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, OFFSHORE OPERATORS COMMITTEE, and WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BALDWIN J. LEE
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
Three Embarcadero Ctr.
12th Floor
San Francisco, CA 94111
(415) 273-7446

JOHN P. ELWOOD
KEVIN A. GAYNOR
JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500W
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amici Curiae

[Additional counsel listed inside cover]

KEVIN W. BROOKS
VINSON & ELKINS LLP
2001 Ross Ave., Suite 3900
Dallas, TX 75201
(214) 220-7805

Counsel for Amici Curiae

GEORGE W. ABELE
PAUL HASTINGS LLP
515 South Flower St.,
25th Floor
Los Angeles, CA 90071
(213) 683-6131

Counsel for Beta Operating Company, LLC (dba BETA OFFSHORE) and Amplify Energy Corp.

DAVID J. COOPER
CATHERINE E. BENNETT
VANESSA FRANCO CHAVEZ
KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB & KIMBALL, LLP
4550 California Ave.,
2nd Floor
Bakersfield, CA 93309
(661) 395-1000

Counsel for Ensign United States Drilling (California), Inc.

DAVID C. MCDERMOTT
DCOR, LLC
290 Maple Court
Suite 290
Ventura, CA 93003
(805) 535-2073

Counsel for DCOR, LLC

STACY R. LINDEN
MATTHEW A. HAYNIE
AMERICAN PETROLEUM INSTITUTE
1220 L St., NW
Washington, DC 20005
(202) 828-8000

Counsel for American Petroleum Institute

BENJAMIN G. SHATZ
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4383

Counsel for California Independent Petroleum Association

JOSHUA D. KIENITZ
LITTLER MENDELSON, P.C.
1255 Treat Blvd, Suite 600
Walnut Creek, CA 94597
(415) 399-8451

Counsel for Ardent Companies, Inc.

BARRY RUSSELL
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
1201 15th St., NW
Suite 300
Washington, DC 20005
(202) 857-4722

Counsel for Independent Petroleum Association of America

EVAN H. ZIMMERMAN
OFFSHORE OPERATORS COMMITTEE
2400 Veterans Memorial Blvd., Suite 206
Kenner, LA 70062
(504) 904-7966

Counsel for the Offshore Operators Committee

PETER C. TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th Street, NW,
Suite 700
Washington, DC 20001
(202) 637-3133

Counsel for National Association of Manufacturers

RANDALL LUTHI
NATIONAL OCEAN INDUSTRIES ASSOCIATION
1120 G Street, NW, Suite 900
Washington, DC 20005
(202) 347-6900

Counsel for the National Ocean Industries Association

OYANGO A. SNELL
WESTERN STATES PETROLEUM ASSOCIATION
1415 L Street, Suite 900
Sacramento, CA 95814
(916) 325-3115

Counsel for Western States Petroleum Association

TABLE OF CONTENTS

Table of Authorities ii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 4

I. The Ninth Circuit's Decision Rejects Decades Of Settled Law 6

II. The Ninth Circuit's Decision Disrupts Employment Relationships Formed In Reliance On Settled Law 13

III. The Ninth Circuit's Decision Gives States Supremacy Over Federal Law, And Invites Efforts To Frustrate Federal Policy 19

Conclusion 25

TABLE OF AUTHORITIES

Cases: **Page(s)**

Aera Energy LLC v. *Salazar*,
642 F.3d 212 (D.C. Cir. 2011) 18

Air Logistics of Alaska, Inc. v. *Throop*,
181 P.3d 1084 (Alaska 2008)..... 12

Bonner v. *City of Prichard*,
661 F.2d 1206 (11th Cir. 1981) 9

Chevron Oil Co. v. *Huson*,
404 U.S. 97 (1971) 7, 9, 12, 14

Cont'l Oil Co. v. *London S.S. Owners' Mut. Ins. Ass'n*,
417 F.2d 1030 (5th Cir. 1969) .....*passim*

EP Operating Ltd. P'ship v. *Placid Oil Co.*,
26 F.3d 563 (5th Cir. 1994) 18

Espinoza v. *Beta Operating Co.*,
No. 15-cv-4659 (C.D. Cal. Oct. 29, 2015) 9

Garcia v. *Freeport-McMoRan Oil & Gas LLC*,
No. 16-cv-4320 (C.D. Cal. Sept. 16, 2016) 9

Gulf Offshore Co. v. *Mobil Oil Corp.*,
453 U.S. 473 (1981) .....*passim*

Jefferson v. *Beta Operating Co.*,
No. 15-cv-4966 (C.D. Cal. Nov. 3, 2015) 9

Leo Sheep Co. v. *United States*,
440 U.S. 668 (1979) 22

Maryland v. *Louisiana*,
451 U.S. 725 (1981) 9, 21, 22

Meadows v. *Latshaw Drilling Co.*,
866 F.3d 307 (5th Cir. 2017) 14

Cases—Continued: **Page(s)**

Mendiola v. *CPS Sec. Solutions, Inc.*,
340 P.3d 355 (Cal. 2015) 12

Mersnick v. *USProtect Corp.*,
No. 06-cv-3993, 2006 WL 3734396
(N.D. Cal. Dec. 18, 2006) 24

Nat'l Ass'n of Mfrs. v. *Dep't of Defense*,
138 S. Ct. 617 (2018) 23

Nations v. *Morris*,
483 F.2d 577 (5th Cir. 1973) 8

Offshore Logistics, Inc. v. *Tallentire*,
477 U.S. 207 (1986) 7

Pac. Operators Offshore, LLP v. *Valladolid*,
565 U.S. 207 (2012) 4, 22

Reyna v. *Venoco, Inc.*,
No. 15-cv-4525 (C.D. Cal. Oct. 23, 2015) 9

Rodrigue v. *Aetna Cas. & Sur. Co.*,
395 U.S. 352 (1969) ..... *passim*

Shell Oil Co. v. *Iowa Dep't of Revenue*,
488 U.S. 19 (1988) ..... *passim*

Sullivan v. *Oracle Corp.*,
254 P.3d 237 (Cal. 2011) 17

Tetra Techs., Inc. v. *Cont'l Ins. Co.*,
814 F.3d 733 (5th Cir. 2016) 8, 10

Texaco Expl. & Prod., Inc. v. *AmClyde Engineered Prods. Co.*,
448 F.3d 760 (5th Cir. 2006) 8

Texaco Inc. v. *Louisiana Land & Expl. Co.*,
995 F.2d 43 (5th Cir. 1993) 9

Cases—Continued: **Page(s)**

Union Texas Petroleum Corp. v. *PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990) 9, 10

United States v. *California*, 332 U.S. 19 (1947) 20, 21

United States v. *Louisiana*, 339 U.S. 699 (1950) 20, 21

United States v. *Maine*, 420 U.S. 515 (1975) 4, 20, 21, 22

United States v. *Texas*, 339 U.S. 707 (1950) 20, 21

Williams v. *Brinderson Constructors, Inc.*, No. 15-cv-2474, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015) 9

Statutes:

43 U.S.C. §§1301-1315 22

43 U.S.C. §1331 4

43 U.S.C. §1331(a) 4

43 U.S.C. §1332(1) 4

43 U.S.C. §1333(a)(2)(A) 5, 6, 8, 23

43 U.S.C. §1337(a) 18

43 U.S.C. §1337(b) 18

Rules:

29 C.F.R. §785.23 ..... 12, 23

30 C.F.R. §560.202 18

Other Authorities: **Page(s)**

Andre Stepankowsky, *West Coast States Push Back on Drilling Proposal*, THE DAILY NEWS (Jan. 5, 2018) 24

Bureau of Ocean Energy Mgmt., *Alaska OCS Region* 12

Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region* 10

Bureau of Ocean Energy Mgmt., *Pacific OCS Region* 12

Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy*, GREATER NEW ORLEANS, INC. (2014) 15

H.R. Rep. No. 215 83rd Cong., 1st Sess. (1953) 20

International Association of Drilling Contractors, *Life on a Drilling Rig* 15

Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: 'Not Here, Not Now,'* CNBC (Sept. 8, 2018) 24

Jim Nicholson, *The Incredible Economic Opportunities of Offshore Energy Exploration*, NAT'L REVIEW (Oct. 1, 2018) 15

The Economic Impacts of Allowing Access to the Eastern Gulf of Mexico for Oil and Natural Gas Exploration and Development (2018) 18

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan. 2018) 11, 15

Other Authorities—Continued: **Page(s)**

Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953) 13, 21

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are companies with oil and gas operations on the Outer Continental Shelf ("OCS") or in the offshore industry, and trade associations whose members operate in, serve, or have other interests in that industry. *Amici curiae* Freeport-McMoRan Oil & Gas LLC, Amplify Energy Corp. (partly through its subsidiary Beta Operating Company, LLC), Ardent Companies, Inc., DCOR, LLC, and Ensign United States Drilling (California), Inc., are companies engaged in the acquisition, exploration, development, and production of oil and gas properties on the OCS, and which employ individuals to work on offshore OCS platforms off the California coast and in the Gulf of Mexico. Several *amici* are defendants in pending litigation in which OCS platform workers assert wage-and-hour claims under California law. Because those cases will likely be affected by the disposition of this case, those *amici* have a direct and substantial interest in this case.

Amici the American Petroleum Institute, California Independent Petroleum Association, Independent Petroleum Association of America, National Association of Manufacturers, National Ocean Industries Association, Offshore Operators Committee, and Western States Petroleum Association are trade associations representing business interests

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. The parties were given timely notice and have consented to this filing.

involved or supporting the offshore industry, including crude oil and natural gas producers and oil and natural gas exploration and production companies with operations on the OCS.

Collectively, *amici* participate regularly in legislative, regulatory, and judicial proceedings that may affect their or their members' interests. *Amici* have an interest in ensuring a stable and predictable legal framework governing the offshore industry, to allow businesses and employees to know which labor and employment practices (among other laws) apply to U.S. offshore operations. All *amici* have a strong and direct interest in the question presented here—*i.e.*, the circumstances in which state wage-and-hour laws might apply to operations on the OCS.

INTRODUCTION AND SUMMARY OF ARGUMENT

As petitioner Parker Drilling Management Services, Ltd. ("Parker") has demonstrated, this Court's review is urgently warranted. The decision below departs from decades of settled law, opens a split among the federal circuits having jurisdiction over virtually *all* oil and gas activity on the OCS, and misconstrues the text, history, and purpose of the Outer Continental Shelf Lands Act ("OCSLA"). Pet. 3-4. *Amici* focus here on four particular reasons why this Court should grant review.

First, in interpreting OCSLA to allow state law to apply on the OCS even in the absence of a "gap" in federal law, the Ninth Circuit expressly rejected a rule that is settled law in the Fifth and Eleventh Circuits. In so doing, it created a square conflict

among the federal courts of appeals with territorial jurisdiction over virtually all U.S. oil and gas operations on the OCS. This conflict undermines predictability and uniformity for those—like several *amici* or their members—with operations in both the Gulf of Mexico and offshore of the West Coast.

Second, by rejecting a legal standard that has provided the choice-of-law framework on the OCS for almost 50 years, the decision disrupted longstanding and mutually beneficial employment relationships carefully tailored to the unique circumstances of living and working offshore. It has replaced them with uncertainty and confusion regarding compensation, benefits and employment relations. And the Ninth Circuit's decision potentially subjects OCS employers to hundreds of millions of dollars in retroactive damages, fines, and penalties—above and beyond the already generous wages and benefits employees have enjoyed under existing arrangements.

Third, the Ninth Circuit's decision effectively accords state law supremacy over federal law in an area under exclusive federal jurisdiction and control, contrary to Congress's intent and this Court's longstanding precedent. This case asks whether California state law requiring employees to be paid for non-working (and even sleeping) hours displaces federal regulations long providing the opposite. But if the decision below stands, it will give rise to a host of other conflicts and business uncertainties. For instance, federal law currently instructs an employer to pay overtime wages only if an employee works more than 40 hours in a week, while California law

requires overtime to be paid for every hour above 8 worked in a single day.

Finally, given the reality that some states will have different—and even diametrically opposed—policy preferences than the federal government regarding OCS activity, this decision invites strategic behavior. It allows states to promulgate laws intended to increase the difficulty and cost of OCS operations that the federal government seeks to encourage. That result is particularly intolerable, given Congress's choice to make the OCS an area within exclusive federal jurisdiction, subject exclusively to federal law.

ARGUMENT

When businesses decide whether and how to invest and operate on the OCS, a key threshold question is whether federal or state law applies. The Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*, defines the body of law applicable to the OCS and the structures there, including drilling and production platforms. See *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969).

By enacting OCSLA, which extended the jurisdiction of the United States and its laws to the OCS, "Congress * * * affirm[ed] the Federal Government's authority and control over the [OCS]." *Pac. Operators Offshore, LLP* v. *Valladolid*, 565 U.S. 207, 212 (2012) (citing 43 U.S.C. §§1331(a), 1332(1)); see also *United States* v. *Maine*, 420 U.S. 515, 522 (1975) (discussing pre-OCSLA cases holding that the "control and disposition" of the OCS was "in the first instance * * * the business of the Federal Government

rather than the States"). The OCS, and the platforms attached to it, are "subject to the exclusive jurisdiction and control of the Federal Government." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 27 (1988); accord *Rodrigue*, 395 U.S. at 355-357 ("[i]t is evident * * * that federal law is 'exclusive' in its regulation of" the OCS and the structures fixed thereon).

Recognizing that federal law might not address the full range of legal issues potentially arising on the OCS, Congress included a choice-of-law provision that this Court and every other court to consider the question until now have understood to "supplement[] gaps in the federal law with state law." *Rodrigue*, 395 U.S. at 357 (citing 43 U.S.C. §1333(a)(2)(A)). Under this provision, "[a]ll law applicable to the [OCS] is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480-481 (1981) (citations omitted); see also Pet. 33-34 ("state law *never* applies of its own force under OCSLA," because adopted state law becomes "'the law of the United States'" (quoting *Rodrigue*, 395 U.S. at 355-356)).

Contrary to long-settled precedent and widely held expectations of employers and employees alike, the Ninth Circuit held here that workers employed on OCS platforms may bring claims under state wage-and-hour laws. Pet. App. 1-2. The Ninth Circuit expressly "reject[ed] the proposition"—first es-

tablished in the Fifth Circuit and since accepted nationwide—that state law applies on the OCS *only* if "necess[ary] to fill a significant void or gap" in federal law. Pet. App. 2 (citing *Cont'l Oil Co.* v. *London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969)).

The Ninth Circuit's decision is already having—and if allowed to stand, will continue to have—far-reaching practical and financial consequences not only for OCS employers, but also for thousands of employees working offshore pursuant to generous contractual and other arrangements predicated on a legal framework the panel discarded. Under the decision below, the terms of those employment arrangements very likely will no longer be sustainable or mutually beneficial.

I. The Ninth Circuit's Decision Rejects Decades Of Settled Law

Half a century ago, the Fifth Circuit articulated a clear and easily implemented standard for when state law applies as surrogate federal law under §1333(a)(2)(A). That standard comports with OCSLA's text and purpose, this Court's precedent, longstanding industry practice, employee expectations, and common sense. The Ninth Circuit, however, explicitly rejected that settled understanding, creating a square circuit split and introducing destabilizing uncertainty into OCSLA's governing legal framework.

As even the Ninth Circuit acknowledged, see Pet. App. 11-14, any understanding of OCSLA must begin with *Rodrigue* v. *Aetna Casualty & Surety Co.*,

395 U.S. 352 (1969). After exhaustively considering the statutory text, history, and purpose, *Rodrigue* concluded that OCSLA "makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to * * * artificial islands [affixed on the OCS] as though they were federal enclaves in an upland State." *Id.* at 355.

Turning first to the statutory text, this Court found it "evident * * * that federal law is 'exclusive' in its regulation of [the OCS]," and that state law is adopted as surrogate federal law only when necessary to "supplement[] gaps in the federal law." *Id.* at 357. The statute's history, this Court concluded, also "makes it clear that state law could be used to fill federal voids" but that ultimately "federal law should prevail." See *id.* at 357-359. However, "for federal law to oust adopted state law[,] federal law must first apply." *Id.* at 359. On the facts of that case, this Court concluded that federal law did not apply, see *id.* at 359-366, thus "remov[ing] any obstacle to the application of state law," see *id.* at 355, 366. In other words, because federal law did not apply *at all*, "a substantial 'gap' in federal law" existed, to be "filled with the applicable body of state law." See *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 101 (1971) (discussing *Rodrigue*, 395 U.S. 352); see also *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 217-218 (1986) (explaining that in *Rodrigue*, federal law did not apply, and thus did not "preclude the application of state law as adopted federal law through OCSLA").

Shortly after *Rodrigue*, the Fifth Circuit addressed whether state law is "applicable and not inconsistent" under §1333(a)(2)(A) when existing federal law *does* provide a comprehensive governing scheme. Applying "the recurring theme of *Rodrigue*," the Fifth Circuit concluded that "the deliberate choice of federal law, federally administered, requires that 'applicable' [in §1333(a)(2)(A)] be read in terms of necessity—necessity to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036. Otherwise put, when federal law provides both a right and a remedy, the application of state law is neither "needed [n]or permitted" under OCSLA. *Id.* at 1035-1036; see also *Nations* v. *Morris*, 483 F.2d 577, 590 (5th Cir. 1973) (when a comprehensive federal statutory scheme applies on the OCS, "[t]here is no need to bring aboard" state law "to cause liability to be fixed where Congress never intended it").

Since 1969, the Fifth Circuit has consistently held that "OCSLA adopts the law of the adjacent state * * * as surrogate federal law" only "[w]hen there are 'gaps in the federal law[.]'" *Tetra Techs., Inc.* v. *Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016) (quoting *Rodrigue*, 395 U.S. at 357); see also, *e.g.*, *Texaco Expl. & Prod., Inc.* v. *AmClyde Engineered Prods. Co.*, 448 F.3d 760, 772 (5th Cir. 2006) ("OCSLA extends federal law to the [OCS] and borrows adjacent state law as a gap-filler."). This Court also similarly reaffirmed *Rodrigue*'s central premise—namely, that the laws of the adjacent States apply under OCSLA only when necessary "to fill the substantial 'gaps' in the coverage of federal law." *Gulf Offshore*, 453 U.S. at 480-481; see also, *e.g.*,

Maryland v. *Louisiana*, 451 U.S. 725, 752 n.26 (1981); *Huson*, 404 U.S. at 103-105. *Continental Oil* itself is sufficiently longstanding that it also serves as binding precedent in the Eleventh Circuit. See Pet. 11-12, 18; see also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). And the decision had been consistently followed by district courts in the Ninth Circuit.[2] In other words, until this case, the *Continental Oil* standard governed virtually all offshore oil and gas operations on the OCS.

Despite the panel's suggestion that the Fifth Circuit has departed from this settled framework, *Continental Oil* remains good law today. See Pet. 18-20. Notably, the very case the Ninth Circuit cited as creating uncertainty, *Union Texas Petroleum Corp.* v. *PLT Engineering, Inc.*, 895 F.2d 1043 (5th Cir. 1990), acknowledged the central holding of both *Rodrigue* and *Continental Oil*, emphasizing that Congress intended for "the OCS [to] be treated as an area of exclusive federal jurisdiction * * * where state law will apply *to fill in the gaps in the federal law*."[3] *Id.* at 1052 (emphasis added). *PLT* did not

---

[2] See, *e.g.*, *Garcia* v. *Freeport-McMoRan Oil & Gas LLC*, No. 16-cv-4320 (C.D. Cal. Sept. 16, 2016); *Jefferson* v. *Beta Operating Co.*, No. 15-cv-4966 (C.D. Cal. Nov. 3, 2015); *Espinoza* v. *Beta Operating Co.*, No. 15-cv-4659 (C.D. Cal. Oct. 29, 2015); *Reyna* v. *Venoco, Inc.*, No. 15-cv-4525 (C.D. Cal. Oct. 23, 2015); *Williams* v. *Brinderson Constructors, Inc.*, No. 15-cv-2474, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015).

[3] Even if *PLT* had purported to overrule *Continental Oil*, which the opinion gave no hint of doing, see Pet. 18, *Continental Oil* would still control. See *Texaco Inc.* v. *Louisiana Land & Expl. Co.*, 995 F.2d 43, 44 (5th Cir. 1993) ("[i]n the event of

focus on whether a gap existed in federal law because—unlike in this case, in which the Fair Labor Standards Act ("FLSA") provides a comprehensive scheme, see Pet. 8-9, 30-32—there was no federal law to apply. See *PLT*, 895 F.2d at 1047 ("*Rodrigue* made clear that 'for federal law to oust adopted state law, federal law must first apply'" (quoting *Rodrigue*, 395 U.S. at 359)). Moreover, as even the panel below ultimately acknowledged, *Continental Oil* and *PLT* can be reconciled in a way that preserves the full force of the *Continental Oil* rule, "such that the *PLT* conditions come into play only if there is a significant gap or void in federal law." Pet. App. 19 (citing *Tetra Techs.*, 814 F.3d at 738). The direct conflict between the Fifth and Eleventh Circuits, on one hand, and the Ninth Circuit's decision, on the other, strongly supports this Court's review.

Several features of OCS oil and gas operations and OCSLA litigation exacerbate the practical consequences of the circuit split. The Fifth, Eleventh, and Ninth Circuits collectively have jurisdiction over virtually all existing operations on the OCS in the United States—*i.e.*, the Pacific Coast (including Alaska) and the Gulf Coast. The vast majority of America's coastal waters currently open to offshore oil and gas production activity are located off the coasts of States within the territorial jurisdiction of the Fifth and Eleventh Circuits.[4] To the extent drill-

---

conflicting panel opinions * * *, the earlier one controls" (citations and internal quotation marks omitted)).

[4] See Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region/ (areas

ing occurs elsewhere, it is located almost entirely offshore of States within the Ninth Circuit's jurisdiction.[5] As a result, OCSLA litigation occurs all but exclusively in these circuits. Moreover, for companies with offshore operations in both regions, enterprise-wide policies and employer-employee relationships are subject to Fifth, Eleventh, and Ninth Circuit jurisdiction simultaneously. The Ninth Circuit's decision means that such companies and their employees will face inconsistent choice-of-law analysis—and ultimately inconsistent substantive obligations—depending on where operations are located, undermining uniformity in the implementation of OCSLA.

The Ninth Circuit's decision could significantly disrupt oil and gas operations on the OCS. Employers and employees associated with drilling and production platforms have structured employment relationships in reliance on the long-settled line of cases including *Rodrigue* and *Continental Oil*. If the decision here stands, operations along the Pacific Coast will be governed by different choice-of-law rules than those in the Gulf, undermining expectations and disrupting contractual and other arrangements.

---

off the coasts of Texas, Louisiana, Mississippi, and Alabama "generat[e] about 97% of all OCS oil and gas production").

[5] See, *e.g.*, U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., ***2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*** (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

Even within the Ninth Circuit, OCS operations now face different legal rules, depending on their location. Four States within the Ninth Circuit's jurisdiction—California, Oregon, Washington, and Alaska—are adjacent to offshore OCS oil and gas activity.[6] Stark differences exist in their laws. For example, courts of those states have reached diametrically opposing views about compensation for employees who reside on an employer's premises for extended periods of time. Compare *Mendiola* v. *CPS Sec. Solutions, Inc.*, 340 P.3d 355, 362-363 (Cal. 2015) (under state law, on-call hours, including "sleep time," represent "hours worked" for overtime purposes), with *Air Logistics of Alaska, Inc.* v. *Throop*, 181 P.3d 1084, 1092-1094 (Alaska 2008) (sleep and recreation time need not be compensated as overtime work).[7]

To be sure, Congress recognized in OCSLA that in some circumstances, an interest in "national uniformity" would give way to other considerations. Pet. App. 38 (quoting *Gulf Offshore*, 453 U.S. at 487; *Huson*, 404 U.S. at 104); Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New*

---

[6] See Bureau of Ocean Energy Mgmt., *Pacific OCS Region*, https://www.boem.gov/Pacific-Region/; Bureau of Ocean Energy Mgmt., *Alaska OCS Region*, https://www.boem.gov/Alaska-Region/.

[7] Federal regulations addressing compensation for employees who reside on their employers' premises "for extended periods of time" provide that employees are "not considered as working all the time [they are] on the premises," and give effect to "any reasonable agreement of the parties" concerning wages for overtime work. 29 C.F.R. §785.23.

Frontier, 6 STAN. L. REV. 23, 40-41 (1953). But Congress assured a minimum degree of uniformity by "incorporati[ng] * * * the law of adjacent States *to fill gaps in federal law*." See *Gulf Offshore*, 453 U.S. at 479 n.7, 486-488 (emphasis added). This Court's review is essential to ensure uniformity and predictability in the choice-of-law framework, in a manner consistent with OCSLA's text and intent.[8]

II. The Ninth Circuit's Decision Disrupts Employment Relationships Formed In Reliance On Settled Law

For decades, employers and employees on OCS drilling and production platforms have implemented compensation and benefit structures under a shared understanding of substantive background law. Whether by arms-length negotiated contracts, collective bargaining, or other arrangements, these policies have been tailored to the offshore industry, recognizing (among other things) that workers often temporarily reside on premises. The terms of these arrangements generally are far more favorable—including with respect to wages, overtime, and other benefits—than those seen in non-OCS industries typically covered by state wage-and-hour laws. By rejecting the legal principles on which these relationships were based, and potentially exposing employers to massive retroactive liability for reasona-

---

[8] The possibility of expanded OCS operations under current U.S. policy will only heighten the need for uniformity and consistency in the governing legal framework. See *supra* n.5.

bly relying on longstanding law, the panel undermined the stability of those relationships, with tremendous practical and financial consequences.[9]

Oil and gas operations on the OCS present unique opportunities and challenges. Production platforms affixed to the OCS operate 24 hours a day and are often in remote locations miles from the coast. While some employees may have the option to return home each night, in other instances, it may be impractical or undesirable to commute. For example, employees may prefer not to commute given travel time and logistics. Others may not reside near enough to allow commuting, for instance choosing to live in a less expensive inland area rather than in a California coastal city such as Santa Barbara. As a result, employees often work agreed-upon shifts, or "hitches," in which the employees work, eat, sleep, and live on the platforms for a specified number of days—typically followed by an equal number of days off. See Pet. App. 3 (14-day shifts on the platform with employees scheduled to work 12 hours during a 24-hour period, followed by 14 days at home); see also *Meadows* v. *Latshaw Drilling Co.*, 866 F.3d 307, 309 (5th Cir. 2017).

In recognition of the particular circumstances of work on OCS drilling platforms, employees receive and enjoy above-market salaries, generous benefits,

---

[9] The Ninth Circuit reserved for the district court to decide in the first instance "whether [the] holding should be applied retrospectively." Pet. App. 43 (citing *Huson*, 404 U.S. at 106-107).

and abundant time off.[10] Long before the decision at issue here, OCS employees received hourly rates "well above the state and federal minimum wage" and "premium rates for overtime hours." Pet. App. 20. By one recent estimate, offshore oil and gas workers earn more than 150% of the average hourly wage of other employees.[11] Moreover, during the non-working (*e.g.*, sleeping and recreation) hours within a hitch that form the basis for this lawsuit, employees can use their time as they see fit. The platforms are equipped with various amenities for employees to use free of charge, including cable television, internet access, and fitness and recreation facilities, allowing employees to engage cost-free in many of the same personal and leisure activities

---

[10] See, *e.g.*, International Association of Drilling Contractors, *Life on a Drilling Rig*, http://drillingmatters.iadc.org/life-on-a-drilling-rig/.

[11] U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan. 2018), https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/; see also Jim Nicholson, *The Incredible Economic Opportunities of Offshore Energy Exploration*, NAT'L REVIEW (Oct. 1, 2018), https://www.nationalreview.com/2018/10/the-incredible-economic-opportunities-of-offshore-energy-exploration/ (stating that "natural gas and oil exploration jobs offer average salaries of $116,000 a year, without necessarily requiring a college degree"). A study examining the economic impacts of energy activity in Louisiana estimated that the average wage earned by employees in the oil and gas extraction area was 180% of the overall average. Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy* at 46, GREATER NEW ORLEANS, INC. (2014), http://www.noia.org/wp-content/uploads/2014/04/Future_of_Energy_FINAL-GNO-INc.pdf.

they enjoy on land. Employees live and eat rent-free during shifts, with employers providing lodging and bathing facilities, meals, and cleaning services at no cost to employees. And when the hitch is over, the employee returns home to spend an equivalent number of days off.

Employers and employees in the offshore industry have crafted these mutually beneficial wage-and-benefit policies based on a shared understanding of the governing legal framework, see *supra* § I, and the industry's practical and financial realities. By altering the background legal framework, the Ninth Circuit's decision is all but certain to significantly disrupt those relationships. Overnight, employers in the Ninth Circuit became subject to state wage-and-hour laws designed for conventional (*e.g.*, 9-to-5) employment but ill-tailored to the OCS's unique working environment.

The disruptive effects are numerous. Offshore employers are now faced with changing not only base pay and overtime arrangements, but also a range of other employment terms, such as benefit packages. Some benefits provided to offshore workers—such as life insurance policies provided by third-party financial institutions—are tied to a worker's base pay. Thus, reducing base pay to offset the additional cost of paying for sleep time would have cascading collateral consequences, often to the employee's detriment. The decision's ripple effects stretch beyond employees of platform operators; contractors providing food service, cleaning, and other services on platforms now face uncertainty about paying their own employees.

Moreover, if applied retroactively, the Ninth Circuit's decision could inflict hundreds of millions of dollars of liability on employers who structured operations in reliance on cases like *Rodrigue* and *Continental Oil*. Such a result would give employees—already generously compensated under existing arrangements—a windfall of backpay, plus interest and penalties. Going forward, it is doubtful that employers could offer such generous compensation and benefit terms, if relationships are subject to state-law overtime and other requirements enacted without regard for the unique circumstances of OCS work. Thus, the Ninth Circuit's decision not only creates the potential for significant retroactive liability, it is disrupting employer-employee relationships, industry-wide.

Both sides would benefit from having a uniform choice-of-law regime governing the OCS. Otherwise, both employers and employees will face a different legal regime depending on whether they are operating in the Gulf of Mexico or off the Pacific Coast—and which neighboring state is closest to that location. Indeed, because individual employees may move between the Gulf of Mexico and the Pacific Coast on a short-term basis, they could be subject to multiple pay structures in a given year or month.[12] Increasing the cost of OCS operations could also

[12] For instance, Pacific Coast platform operators may hire specialist teams from the Gulf of Mexico to perform particular tasks, such as plugging and abandonment of wells, on a short-term or extended basis. Such workers could be subject to certain provisions of California employment law beginning with their first full day of work. *E.g.*, *Sullivan* v. *Oracle Corp.*, 254 P.3d 237 (Cal. 2011).

shorten the economic life of some offshore facilities, harming not only employees, but also the federal government, and ultimately taxpayers.

The federal government has a substantial "proprietary interest in the OCS." *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994) (citation omitted). OCSLA authorizes the Secretary of the Interior to offer and administer oil and gas leases on the OCS. *Aera Energy LLC* v. *Salazar*, 642 F.3d 212, 214 (D.C. Cir. 2011). Under such leases, private companies pay "an up-front bonus, annual rentals, and royalties on oil and natural gas actually produced" during the lease term. *Ibid.* (citing 43 U.S.C. §1337(a), (b)); see also 30 C.F.R. §560.202 (describing bidding systems). Offshore activity generates billions in federal revenue. Increasing the costs and potential liability of offshore production activity could deprive the federal government of significant revenue, not only lowering the government's annual royalties from existing leases, but also deterring operators from bidding on new leases and slowing development on the OCS overall.[13]

---

[13] One recent study estimated that expanding oil and gas activity in the Eastern Gulf of Mexico alone could increase federal revenues from royalties, bonus bids, and rents by some $41.5 billion. See *The Economic Impacts of Allowing Access to the Eastern Gulf of Mexico for Oil and Natural Gas Exploration and Development* at 5 (2018), http://www.noia.org/wp-content/uploads/2018/04/180309-Calash-Eastern-Gulf-Development-Economic-Impacts-Report-Final.pdf.

III. The Ninth Circuit's Decision Gives States Supremacy Over Federal Law, And Invites Efforts To Frustrate Federal Policy

The Ninth Circuit's decision effectively gives state law supremacy over federal law, contrary to OCSLA's text and intent. In OCSLA, "Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." *Shell Oil*, 488 U.S. at 27 (citations and internal quotation marks omitted). And because "the OCS [is] subject to the exclusive jurisdiction and control of the Federal Government," *ibid.*, "federal law should prevail" over state law, particularly where, as here, a federal statutory scheme does apply. *Rodrigue*, 395 U.S. at 358.

Notwithstanding the panel's attempt to downplay the issue, the Ninth Circuit's decision effectively "accord[s] state law supremacy over federal law" and "cede[s] the United States' jurisdiction over the OCS to state agencies." Pet. App. 23. In the Ninth Circuit's mistaken view, even when a comprehensive federal scheme governs claims arising on the OCS, state law will control so long as it "pertain[s] to the subject matter at hand," Pet. App. 21-27, and is not "inconsistent with" existing federal law (under the Ninth Circuit's diluted reading of "inconsistent," see Pet. App. 27-39). The Ninth Circuit's interpretation, which blesses the wholesale application of state law on the OCS, cannot be reconciled with OCSLA's text and purpose.

Beginning in the 1930s, coastal States and the federal government became locked in a dispute over

"territorial jurisdiction and ownership of the OCS." *Shell Oil*, 488 U.S. at 26-27. This Court settled that debate in 1947, holding that the federal government, and not the states, had "paramount rights in and power over" the OCS. *United States* v. *California*, 332 U.S. 19, 38-39 (1947). Three years later, this Court reaffirmed that the OCS

> is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

United States v. *Louisiana*, 339 U.S. 699, 704 (1950); see also *United States* v. *Texas*, 339 U.S. 707, 719-720 (1950). These cases established that, as a matter of constitutional structure, "paramount rights" to the OCS are "an incident to national sovereignty," meaning that the control of the OCS is "in the first instance * * * the business of the Federal Government rather than the States." *Maine*, 420 U.S. at 522.

Shortly thereafter, Congress enacted OCSLA in an effort "to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea." *Maine*, 420 U.S. at 527 (quoting H.R. Rep. No. 215 83rd Cong., 1st Sess. 2 (1953)); see also *Gulf Offshore*, 453 U.S. at 479 n.7. Perhaps "the most challenging question of legal theory" Congress faced in drafting OCSLA

was what law should apply on the OCS. Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 37.[14]

Congress deliberately rejected a blanket application of either maritime law or state law to the OCS. See *Rodrigue*, 395 U.S. at 355, 358-359, 361-366. Opponents of OCSLA, led by Louisiana Senator Russell Long, had argued in favor of applying state law on the OCS, enforced by "the officials of such State." *Id.* at 358-359. But Congress rejected "the notion of supremacy of state law administered by state agencies," *Cont'l Oil*, 417 F.2d at 1036 (citing *Rodrigue*, 395 U.S. at 358), opting instead for "a unique combination of federal and state laws," Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 40-41. In adopting this approach, Congress embraced "the constitutional underpinnings" of the *Texas*, *Louisiana*, and *California* cases. See *Maine*, 420 U.S. at 524-527; see also *Maryland*, 451 U.S. at 730.

OCSLA must be understood in the context of this Court's decisions resolving "the clash between national sovereignty and states' rights" on the OCS. *Cont'l Oil*, 417 F.2d at 1036. Indeed, this Court has consistently and repeatedly interpreted OCSLA in light of this historical background. See, *e.g.*, *Shell Oil*, 488 U.S. at 26-27; *Gulf Offshore*, 453 U.S. at 479 n.7; accord *Leo Sheep Co.* v. *United States*, 440 U.S.

---

[14] The choice-of-law issue had "political ramifications" because "the law to be applied had a bearing on the question whether the coastal states were to share in the revenues of the outer Continental Shelf." Christopher, *The Outer Continental Shelf Lands Act*, 6 STAN. L. REV. at 37, 40-41.

668, 669 (1979) ("[C]ourts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." (citation omitted)). Congress's choice in OCSLA "to retain exclusive federal control of the administration of the [OCS]," *Gulf Offshore*, 453 U.S. at 479 n.7, "affirm[s] the Federal Government's authority and control over the [OCS]," *Pac. Operators*, 565 U.S. at 212.[15] While Congress recognized that offshore workers might in some circumstances have "tie[s]" to adjacent States, *Rodrigue*, 395 U.S. at 355, it struck a balance that "manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law." *Gulf Offshore*, 453 U.S. at 479 n.7 (citations omitted).

Despite the fact that Congress expressly rejected "the notion of supremacy of state law administered by state agencies" on the OCS, *Cont'l Oil*, 417 F.2d at 1036, the Ninth Circuit's decision allows state law, enforced by state officials, to control on the OCS. The Ninth Circuit's analysis "accords initially a superiority to adjacent state law" because "the question of federal law comes into play only after this process excludes state law." *Id.* at 1035-1036; but cf. *Rodrigue*, 395 U.S. at 359 (state law applies

---

[15] The same year Congress enacted OCSLA, it passed the Submerged Lands Act, 43 U.S.C. §§1301-1315, which "confirm[ed] the Federal Government's interest in the area seaward of the 3-mile limit." *Maryland*, 451 U.S. at 730; see also *Maine*, 420 U.S. at 524.

under OCSLA only if federal law does not "first apply"). This interpretation effectively reads the word "applicable" out of the statute, "put[ting] almost 100% Emphasis on the not inconsistent with federal laws element of [§1333(a)(2)(A)]," *Cont'l Oil*, 417 F.2d at 1035 (internal quotation marks and alterations omitted), an approach this Court has long disfavored. See Pet. 27-29; but cf. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018) ("[T]he Court is obliged to give effect, if possible, to every word Congress used." (citation and internal quotation marks omitted)).

The practical consequences are real. The Ninth Circuit's decision allows California law to control over a federal regulation explicitly providing that employees residing on a worksite need not be paid for time spent sleeping or otherwise off duty. See 29 C.F.R. §785.23. In effectively overruling federal law, the panel invites workers (and creative plaintiff's lawyers) to retroactively claim a host of extra-contractual rights based in state employment or other laws. And if allowed to stand, the decision will trigger new waves of litigation—and the threat of ever-mounting retroactive liability—every time a state changes its interpretation of its wage, hour, and other employment laws.

The federal-state conflict is stark, where (as here) a federal scheme allows excluding non-working hours from overtime, see 29 C.F.R. §785.23, but state law compels the opposite approach. The Ninth Circuit's decision departs from cases holding that California state wage-and-hour laws could not apply in other federal enclaves, because they conflict with

the FLSA. *E.g.*, *Mersnick* v. *USProtect Corp.*, No. 06-cv-3993, 2006 WL 3734396, at *7-8 (N.D. Cal. Dec. 18, 2006); cf. *Rodrigue*, 395 U.S. at 355 (fixtures on OCS treated as "federal enclaves in an upland State").

In practice, some states have—and likely will always have—different policy preferences than the federal government regarding OCS activity. The panel decision opens the door to strategic behavior, inviting states to promulgate facially neutral but effectively targeted laws that increase the difficulty and cost of OCS operations. The concern is not theoretical. *E.g.*, Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: 'Not Here, Not Now,'"* CNBC (Sept. 8, 2018), https://tinyurl.com/y9lrv8ml (discussing new California legislation intended "to thwart" federal government's "efforts to expand offshore oil drilling along the California coast"); Andre Stepankowsky, *West Coast States Push Back on Drilling Proposal*, THE DAILY NEWS (Jan. 5, 2018), https://tinyurl.com/y7e8flxq (quoting joint statement by Governors of California, Washington, and Oregon opposing federal proposal to expand OCS oil and gas operations).

In short, the Ninth Circuit's decision transforms a statute "intended to provide for the orderly development of offshore resources," *Shell Oil*, 488 U.S. at 27 (citation and internal quotation marks omitted), into a regime of jurisdictional chaos, inviting States to assert ever-increasing authority over commercial activities in an area Congress reserved for primary

federal jurisdiction and control. This Court's review is urgently warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted.

BALDWIN J. LEE
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
Three Embarcadero Ctr.
12th Floor
San Francisco, CA 94111
(415) 273-7446

KEVIN W. BROOKS
VINSON & ELKINS LLP
2001 Ross Ave., Ste. 3900
Dallas, TX 75201
(214) 220-7805

JOHN P. ELWOOD
KEVIN A. GAYNOR
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania
Ave., NW, Suite 500W
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amici Curiae

GEORGE W. ABELE
PAUL HASTINGS LLP
515 South Flower St., 25th Floor
Los Angeles, CA 90071
(213) 683-6131

Counsel for Beta Operating Company, LLC and Amplify Energy Corp.

DAVID J. COOPER
CATHERINE E. BENNETT
VANESSA FRANCO CHAVEZ
KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB & KIMBALL, LLP
4550 California Ave., 2nd Floor
Bakersfield, CA 93309
(661) 395-1000

Counsel for Ensign United States Drilling (California), Inc.

JOSHUA D. KIENITZ
LITTLER MENDELSON, P.C.
1255 Treat Blvd, Ste. 600
Walnut Creek, CA 94597
(415) 399-8451

Counsel for Ardent Companies, Inc.

DAVID C. MCDERMOTT
DCOR, LLC
290 Maple Court, Ste. 290
Ventura, CA 93003
(805) 535-2073

Counsel for DCOR, LLC

STACY R. LINDEN
MATTHEW A. HAYNIE
AMERICAN PETROLEUM INSTITUTE
1220 L St., NW
Washington, DC 20005
(202) 828-8000

Counsel for American Petroleum Institute

BENJAMIN G. SHATZ
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4383

Counsel for California Independent Petroleum Association

BARRY RUSSELL
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
1201 15th Street, NW
Suite 300
Washington, DC 20005
(202) 857-4722

Counsel for Independent Petroleum Association of America

EVAN H. ZIMMERMAN
OFFSHORE OPERATORS COMMITTEE
2400 Veterans Memorial Blvd., Suite 206
Kenner, LA 70062
(504) 904-7966

Counsel for the Offshore Operators Committee

PETER C. TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th St., NW, Ste. 700
Washington, DC 20001
(202) 637-3133

Counsel for National Association of Manufacturers

RANDALL LUTHI
NATIONAL OCEAN INDUSTRIES ASSOCIATION
1120 G Street, NW
Suite 900
Washington, DC 20005
(202) 347-6900

Counsel for the National Ocean Industries Association

OYANGO A. SNELL
WESTERN STATES PETROLEUM ASSOCIATION
1415 L Street, Suite 900
Sacramento, CA 95814
(916) 325-3115

Counsel for Western States Petroleum Association

OCTOBER 2018

No. 18-389

IN THE

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: October 26, 2018

QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act ("OCSLA"), state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit held below.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

REASONS FOR GRANTING THE PETITION 7

I. THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS FROM THE FIFTH CIRCUIT 9

A. The Ninth Circuit Expressly Rejected Fifth and Eleventh Circuit Case Law Interpreting OCSLA 9

B. Contrary to Respondent's Contention, the Fifth Circuit Has Not Abandoned *Continental Oil* 12

II. THE DECISION BELOW DISRUPTS EMPLOYMENT PRACTICES ADOPTED IN REASONABLE RELIANCE ON CASE LAW INTERPRETING OCSLA 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases:

American Economy Ins. Co. v. State of New York,
cert. denied, 138 S. Ct. 2601 (2018) 1

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 17

Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) ..... *passim*

Deere & Co. v. New Hampshire,
cert. denied, 137 S. Ct. 38 (2016) 1

DelCostello v. Int'l Brotherhood of Teamsters,
462 U.S. 151 (1983) 20

Espinosa v. Beta Operating Co.,
No. CV 15-04659 (C.D. Cal. Oct. 29, 2015) 19

Garcia v. Freeport-McMoRan Oil & Gas LLC,
No. CV 16-4320 (C.D. Cal. Sept. 16, 2016) 19

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,
589 F.3d 778 (5th Cir. 2009) (*en banc*) 14

Herb's Welding, Inc. v. Gray,
470 U.S. 414 (1985) 16

Hodgen v. Forest Oil Co.,
87 F.3d 1512 (5th Cir. 1996) 14

Page(s)

Jefferson v. Beta Operating Co.,
No. CV 15-04966 (C.D. Cal. Nov. 3, 2015) 19

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 15, 16

Mendiola v. CPS Sec. Sols., Inc.,
60 Cal. 4th 833 (2015) 8, 19

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 12

Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 20

Reyna v. Venoco, Inc.,
No. CV 15-4525 (C.D. Cal. Oct. 23, 2015) 18

Rodrigue v. Aetna Casualty and Surety Co.,
395 U.S. 352 (1969) 8, 10, 11, 12, 16, 18

Tetra Technologies, Inc. v. Continental Ins. Co.,
814 F.3d 733 (5th Cir. 2016) 6, 11, 14, 17

Union Texas Petroleum Corp. v. PLT Engineering, Inc. [*"PLT"*],
895 F.2d 1043 (5th Cir. 1990) 4, 13, 14

Williams v. Brinderson Constructors, Inc.,
2015 WL 4747892 (C.D. Cal. Aug. 11, 2015) 18

Page(s)

Statutes and Regulations:

Fair Labor Standards Act (FLSA),
29 U.S.C. § 203 ..... 3, 4, 7, 8, 12

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA),
33 U.S.C. § 901 *et seq.* 16
33 U.S.C. § 902(3) 16
33 U.S.C. § 948a 16

Outer Continental Shelf Lands Act (OCSLA),
43 U.S.C. §§ 1331-13356b ..... *passim*
43 U.S.C. § 1333(a)(1) 3, 7
43 U.S.C. § 1333(a)(2) ..... *passim*
43 U.S.C. § 1333(b) 16
43 U.S.C. § 1333(f) 16

Louisiana Oil Well Lien Act (LOWLA),
La. R.S. 9:4961, *et seq.* 13, 14

Private Attorney General Act of 2004 (PAGA),
Calif. Labor Code § 2698, *et seq.* 4

29 C.F.R. § 785.23 ..... 8, 19

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to support continuity in legal doctrines and to ensure that settled expectations of parties are not lightly disregarded. *See, e.g., American Economy Ins. Co. v. State of New York, cert. denied*, 138 S. Ct. 2601 (2018); *Deere & Co. v. New Hampshire, cert. denied*, 137 S. Ct. 38 (2016). WLF filed a brief in this matter when it was before the Ninth Circuit, in support of the petition for rehearing *en banc*.

WLF is concerned that the Ninth Circuit's decision has disrupted settled expectations of employers by rejecting the well-accepted judicial understanding of the meaning of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-13356b. The decision exposes those employers to massive retroactive liability for damages and penalties, for having acted in reasonable reliance on that judicial understanding.

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. More than 10 days prior to filing this brief, WLF notified counsel for Respondent of its intent to file. All parties have consented to the filing.

WLF agrees with Petitioner Parker Drilling Management Services, Inc. that OCSLA does not incorporate California labor law into the federal law that governs wage-and-hour issues arising from employment on oil platforms located on the Outer Continental Shelf (OCS). WLF writes separately to focus on the sharp conflict between the decision below and decisions of the Fifth Circuit, and on the extreme hardship (in the form of massive retroactive liability) to which employers will be exposed if the decision below remains in place. Review is warranted both to resolve that conflict and because companies reasonably relied on an interpretation of OCSLA that had been unanimously accepted by the federal courts until the Ninth Circuit issued its conflicting decision earlier this year.

STATEMENT OF THE CASE

Respondent Brian Newton was employed by Parker Drilling for two years on an oil platform off the California coast, where his typical work day lasted 12 hours. The inaccessibility of the oil platform made it difficult for Newton to return to his home in California during his off hours, and thus he generally remained on the site for 14 days at a time. During Newton's 12 "off" hours, Parker Drilling provided Newton with food, lodging, and recreational facilities on the oil platform at no cost. As the Ninth Circuit recognized, Parker Drilling paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours." Pet. App-20.

A month after Newton ceased working on the oil platform, he filed a putative class action alleging that

Parker Drilling failed to pay him and similarly situated employees in accordance with California labor law. His principal claim is that California law required that he be paid for all hours that he was on the oil platform, even during sleep and rest time. He seeks to recover back pay plus civil penalties under California's Private Attorney General Act of 2004 (PAGA).

OCSLA states that fixed structures (such as drilling platforms) attached to the seabed on the OCS are deemed federal enclaves that are subject to federal law. 43 U.S.C. § 1333(a)(1). It further states that the laws of adjacent States "are declared to be the law of the United States" for those fixed structures, "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). The district court held that California wage-and-hour laws were not "applicable"—because federal law already incorporates a comprehensive statutory scheme governing wage-and-hour claims (the Fair Labor Standards Act) and thus has no need to borrow state wage-and-hour law to fill gaps in federal law—and dismissed the complaint. Pet. App-46 to App-60.

The Ninth Circuit reversed. Pet. App-1 to App-41. It held that state law is "applicable" to a controversy arising on an OCS oil platform whenever (as here) the law is "relevant" to the controversy, and it rejected "the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." *Id.* at App-21. In doing so, it explicitly disagreed with the Fifth Circuit's holding in *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), that state law cannot qualify as "applicable"

under § 1333(a)(2) unless it fills "a significant void or gap" in federal law. *Id.* at App-2. Although recognizing that the FLSA provides a comprehensive federal statutory scheme governing wage-and-hour issues, the court held that applying California law to Newton's claims was not "inconsistent with federal law" because the FLSA merely provides a statutory floor "under which wage protections cannot drop" and that the FLSA permits States to impose a higher level of wage protections. *Id.* at App-36.

Although highly critical of the Fifth Circuit's *Continental Oil* decision, the Ninth Circuit noted Newton's assertion that the Fifth Circuit no longer adheres to that decision. The court identified what it termed a "more recent line of [Fifth Circuit] cases"—beginning with *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* ["*PLT*"], 895 F.2d 1043 (5th Cir. 1990)—which, according to Newton, adopted an entirely new test for determining when OCSLA incorporates state law as surrogate federal law. Pet. App-18. Labeling this allegedly new test the "*PLT* test," the Ninth Circuit stated:

> It remains unclear whether the *PLT* test has superseded the *Continental Oil* test in the Fifth Circuit, or whether the Fifth Circuit views the *Continental Oil* test as a precursor to the *PLT* test, such that the *PLT* conditions come into play only if there is a significant gap or void in federal law.

Id. at App-19. The court did not attempt to resolve that issue; it simply concluded that *Continental Oil*

incorrectly interpreted OCSLA. It severely criticized the conclusion of *Continental Oil* (and its extensive progeny) that state law is not "applicable" under OCSLA unless its adoption as surrogate federal law is necessary to fill a "significant void or gap" in federal law. *Id.* at App-23.

SUMMARY OF ARGUMENT

WLF agrees with Parker Drilling that review is warranted because the Ninth Circuit's decision is incorrect. This Court's OCSLA decisions conclusively demonstrate that state law is not "applicable" to OCSLA cases unless there exists a "significant void or gap" in federal law that can be filled by incorporating the state law. WLF writes separately to focus on two other reasons why review is warranted.

First, the conflict between the decision below and decisions of the Fifth Circuit is irreconcilable. Indeed, the Ninth Circuit expressly rejected the interpretation of OCSLA espoused by the Fifth Circuit in *Continental Oil*—an interpretation that had been adopted by *every* federal court to address the issue prior to the Ninth Circuit's ruling. The conflict is outcome-determinative; had the Ninth Circuit followed *Continental Oil*, it would have affirmed the dismissal of Newton's lawsuit.

Newton argued below—and can be expected to reassert in this Court—that no conflict exists because (he contends) the Fifth Circuit has abandoned *Continental Oil* and has replaced it with a new test—the "*PLT* test"—that supposedly is consistent with the Ninth Circuit's ruling. That argument is

without merit and is based on a misunderstanding of Fifth Circuit case law.

The Fifth Circuit has never backed away from its adherence to *Continental Oil*. The "*PLT* test" cited by Newton is merely a special application of the test developed in *Continental Oil*, applicable to cases in which the party opposing incorporation of state law points to federal maritime law as the comprehensive federal scheme whose existence renders unnecessary any need to incorporate state law.

Thus, for example, the Fifth Circuit held in *Tetra Technologies, Inc. v. Continental Ins. Co.*, 814 F.3d 733 (5th Cir. 2016)—one of the court decisions that, according to the court below, adopted "the *PLT* test"—that Louisiana law governing indemnification agreements would *not* be incorporated into a contract dispute arising under OCSLA if the district court found (on remand) that federal maritime law was applicable to the case, because that body of federal law provides a comprehensive scheme governing maritime contract disputes. 814 F.3d at 740-42. But *Tetra Technologies* certainly did not suggest, in conflict with *Continental Oil*, that the requisite "significant void or gap" in federal law exists whenever federal maritime law is inapplicable to a dispute governed by OCSLA. To the contrary, it stated that OCSLA incorporates state law when there are "gaps in the federal law," without suggesting that federal maritime law is the only federal law that can obviate the need to resort to gap-filling state law. *Id.* at 738.

Second, review is warranted because the decision below threatens massive retroactive liability

for employers who adopted wage-and-hour practices in good-faith reliance on a body of federal case law that had uniformly found state law inapplicable to OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. Moreover, to avoid future liability, employers will likely be forced to significantly restructure their employment practices—a restructuring that may be unsatisfactory to employers and employees alike. Such uncertainty cannot be what Congress had in mind when it adopted OCSLA and declared that fixed structures on the OCS would be governed solely by federal law.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. Congress has decreed that the seabed and subsoil of the OCS—as well as structures "permanently or temporarily attached to the seabed" on the OCS—are subject solely to the federal law of the United States. 43 U.S.C. § 1333(a)(1). Yet the two federal appeals courts in which virtually all cases governed by OCSLA arise—the Fifth and Ninth Circuits—have adopted sharply conflicting understandings of how to go about determining the content of that federal law.[2] As this case illustrates, the conflicting interpretation is likely to result in

---

[2] As Parker Drilling notes, the Eleventh Circuit has adopted as binding precedent decisions issued by the "old" Fifth Circuit before the Eleventh Circuit split off in 1981. Because many of the relevant Fifth Circuit decisions (including *Continental Oil*) pre-date 1981, the decision below also creates a direct conflict with the Eleventh Circuit, within which some cases involving Gulf of Mexico drilling platforms arise.

conflicting decisions in a large number of cases. Review is urgently needed to resolve that conflict.

When it adopted OCSLA in 1953, Congress recognized that existing federal law "might be inadequate to cope with the full range of potential legal problems" likely to arise on the OCS. *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 356 (1969). To address that problem, OCSLA "supplemented gaps in the federal law" by adopting (as federal law) the laws of adjacent States. *Ibid.* Such state laws are incorporated into federal law "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or other Federal laws." 43 U.S.C. § 1333(a)(2). WLF agrees with Parker Drilling that the decision below misinterprets the word "applicable." *Rodrigue* indicates that state law is "applicable" only "where necessary" to fill a gap in federal law, 395 U.S. at 363, and that federal statutory law "would be exclusive if it applied." *Id.* at 359.[3] Contrary to the Ninth Circuit, a state wage-and-hour law is not automatically rendered "applicable" to a claim governed by OCSLA simply because the plaintiff has

---

[3] WLF further agrees with Parker Drilling that California wage-and-hour law is "inconsistent" with the FLSA and its implementing regulations. *Compare, e.g., Mendiola v. CPS Sec. Sols., Inc.*, 60 Cal. 4th 833, 836 (2015) (California wage-and-hour laws entitled security guards to "compensation for all on-call hours spent at their assigned worksites") *with* 29 C.F.R. § 785.23 (under FLSA, "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises."). The Fifth Circuit did not reach the "inconsistent with" issue in *Continental Oil*, having found that the Louisiana law was not "applicable" (within the meaning of OCSLA) to the issue in dispute.

raised a wage-and-hour claim.

WLF writes separately to point out two other reasons why review is warranted: (1) the conflict between the Fifth and Ninth Circuit decisions is irreconcilable and can only be resolved by this Court; and (2) the decision below threatens to disrupt operations of oil and gas companies and expose them to massive liability for having reasonably relied on prior court decisions interpreting the OCSLA.

I. THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS FROM THE FIFTH CIRCUIT

A. The Ninth Circuit Expressly Rejected Fifth and Eleventh Circuit Case Law Interpreting OCSLA

The decision below held that California wage-and-hour law should be incorporated into federal law governing structures affixed to the OCS off the coast of California, even though there is no "gap" in federal wage-and-hour law—the FLSA provides a comprehensive set of federal rules governing wage payments. That holding irreconcilably conflicts with controlling Fifth and Eleventh Circuit case law, which holds that state law is not "applicable" on the OCS unless its incorporation into federal law is necessary to fill a gap in federal law. Review is warranted to resolve that conflict.

In arriving at its interpretation of the word "applicable" in 43 U.S.C. § 1333(a)(2), the "old" Fifth Circuit relied heavily on this Court's *Rodrigue* decision.

Continental Oil, 417 F.2d at 1036. The appeals court explained:

> [OCSLA's] deliberate choice of federal law, federally administered, requires that "applicable" be read in terms of necessity—necessity to fill a significant void or gap. This is the recurring theme of *Rodrigue*. Thus, early in the opinion the Court states since "Federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, [OCSLA] supplemented gaps in the federal law with state law 'through the adoption of State law as the law of the United States.'" ... Mr. Justice White summed it up for the Court emphatically, "This language [from a congressional report] makes it clear that state law could be used to fill federal voids."

Ibid (quoting *Rodrigue*, 395 U.S. at 357, 358).

At issue in *Continental Oil* was whether a Louisiana direct-action statute (which permitted an injured party to sue a tortfeasor's liability insurer directly) should apply to damage claims arising from a collision between a ship and a drilling platform affixed to the OCS. The Fifth Circuit concluded that maritime law provided "a fully effective right and remedy" to the plaintiff—maritime law applies to claims for damages caused by a sea-going vessel. *Id.* at 1035. Given the absence of any "gap" in federal law, the court held that Louisiana law was not "applicable" to the controversy,

within the meaning of § 1333(a)(2).

Continental Oil's continued viability has never been questioned in subsequent Fifth and Eleventh Circuit decisions. Just two years ago, the Fifth Circuit reiterated *Continental Oil*'s central holding, stating that OCSLA adopts state law as "surrogate federal law" "[w]hen there are 'gaps in the federal law.'" *Tetra Technologies*, 814 F.3d at 738 (quoting *Rodrigue*, 395 U.S. at 356).

In holding that California wage-and-hour law applied to Newton's claims arising from his employment on a drilling platform, the Ninth Circuit acknowledged that its interpretation of OCSLA directly conflicted with *Continental Oil*. The court stated:

> We hold that the absence of federal law is not, as the district court concluded, a prerequisite to adopting state law as surrogate federal law under [OCSLA]. We thus *reject* the proposition that "necessity to fill a significant void or gap," *Continental Oil* [417 F.2d at 1036] is required in order to assimilate "applicable and not inconsistent," 43 U.S.C. § 1333(a)(2)(A), state law into federal law governing drilling platforms affixed to the [OCS].

Pet. App-2 (emphasis added).

The Ninth Circuit criticized *Continental Oil* for having "navigated OCSLA's choppy waters by taking legislative history as its lodestar," *id.* at App-22, then

ultimately concluded that "the legislative history is at best muddled." *Id.* at App-25. It expressly disagreed with the Fifth Circuit's conclusion, articulated in *Continental Oil* (and later in *Nations v. Morris*, 483 F.2d 577, 585 (5th Cir. 1973)) that "necessity to fill a significant void or gap" was the "recurring theme of *Rodrigue*." *Id.* at App-27 (quoting *Continental Oil*, 417 F.3d at 1036).

Moreover, the Ninth Circuit implicitly acknowledged that its conflicting interpretation of OCSLA was outcome-determinative. It recognized that Newton's claims were governed by OCSLA. It further recognized that the FLSA provides a comprehensive set of federal rules governing wage-and-hour issues—and thus that there was no significant void or gap in federal law requiring supplementation by California law. Pet. App-35 to App-36. The Fifth Circuit would have held (applying *Continental Oil* to the facts of this case) that California law was not "applicable" and thus would have affirmed the dismissal of Newton's California-law claims. In contrast, the Ninth Circuit held that Newton's wage-and-hour claims (and related claims) were "'applicable and not inconsistent,' 43 U.S.C. § 1333(a)(2)(A), with the FLSA," and it vacated the order dismissing those claims. *Id.* at App-39. Review is warranted in light of the acknowledged and outcome-determinative conflict between the decision below and the case law of the Fifth and Eleventh Circuits.

B. Contrary to Respondent's Contention, the Fifth Circuit Has Not Abandoned *Continental Oil*

Newton argued below—and can be expected to

reassert in this Court—that no conflict exists because (he contends) the Fifth Circuit has abandoned *Continental Oil* and has replaced it with a new test—the "*PLT* test"—that supposedly is consistent with the Ninth Circuit's ruling. That argument is without merit and is based on a misunderstanding of Fifth Circuit case law.

The Fifth Circuit has never backed away from its adherence to *Continental Oil*. The "*PLT* test" cited by Newton is merely a special application of the test developed in *Continental Oil*, applicable to cases in which the party opposing incorporation of state law points to federal maritime law as the comprehensive federal scheme whose existence renders unnecessary any need to incorporate state law.

The *PLT* test derives its name from a 1990 Fifth Circuit decision, *Union Texas Petroleum Corp. v. PLT Engineering, Inc.* ["*PLT*"], 895 F.2d 1043 (5th Cir. 1990). The lawsuit involved claims by subcontractors on an OCS pipeline contract that they were not fully paid for their work. Union Texas Petroleum (UTP), the oil company that contracted for construction of the pipeline, filed an interpleader action that asked a federal district court to determine how undisbursed contract funds should be distributed. The subcontractors counterclaimed, asserting the right to file liens under the Louisiana Oil Well Lien Act (LOWLA). The issue before the Fifth Circuit was whether OCSLA applied and, if so, whether OCSLA incorporated LOWLA into federal law as "applicable" state law. UTP opposed incorporation of LOWLA into federal law, asserting that state law was not "applicable" because federal maritime/ admiralty law

was applicable and provided a sufficiently comprehensive body of law to resolve the dispute.

To determine whether LOWLA applied (thereby permitting the subcontractors to file liens on the pipeline), the Fifth Circuit announced a three-part test (later dubbed "the *PLT* test"):

> [F]or adjacent state law to apply as surrogate federal law under OCSLA, three conditions are significant. (1) The controversy must arise on a situs covered by OCSLA (*i.e.* the subsoil, seabed, or artificial structures permanently or temporarily attached thereto). (2) Federal maritime law must not apply of its own force. (3) The state law must not be inconsistent with Federal law.

PLT, 895 F.2d at 1047. The court concluded that all three conditions were met and thus that the Louisiana lien statute, LOWLA, could properly be applied as surrogate federal law. *Id.* at 1047-50. The Fifth Circuit has adhered to its "*PLT* test" in a number of later decisions in which the party objecting to the application of state law under OCSLA argued that federal maritime law applied and thereby rendered state law "inapplicable" under § 1333(a)(2).[4]

Contrary to Newton's contention, the *PLT* test is

---

[4] *See, e.g., Hodgen v. Forest Oil Co.*, 87 F.3d 1512, 1526 (5th Cir. 1996); *Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778, 783 (5th Cir. 2009) (*en banc*); *Tetra Technologies*, 814 F.3d at 738.

fully consistent with *Continental Oil*. In every reported decision in which the Fifth Circuit has cited the *PLT* test, the party opposing incorporation of state law cited federal maritime law as the body of federal law that obviated the need to incorporate state law into federal law. Under those circumstances, the second part of the three-part *PLT* test (does federal maritime law "apply of its own force?") is simply the Fifth Circuit's way of asking whether a significant void or gap exists in federal law. If federal maritime law applies to an OCSLA case, there is no gap in federal law and thus (under *Continental Oil*) state law is not "applicable" within the meaning of § 1333(a)(2). Contrary to Newton's contention, adoption of the *PLT* test does not signify Fifth Circuit abandonment of *Continental Oil*'s interpretation of the word "applicable."

The Fifth Circuit's frequent invocation of the *PLT* test is a reflection of the fact that parties opposing incorporation of state law into federal law in OCSLA cases most frequently cite the applicability of maritime law as the basis of their opposition. When a party in a OCSLA case points to a different body of federal law as the basis for its anti-incorporation argument, the Fifth Circuit does not apply its *PLT* test (which asks whether federal maritime law "appl[ies] of its own force"). For example, *LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985), affirmed dismissal of a retaliatory discharge claim filed under Louisiana law by an individual who was employed on an OCS drilling platform off the coast of Louisiana. Citing *Continental Oil*, the court determined that Louisiana law was not "applicable" within the meaning of § 1333(a)(2) because federal law provides a non-maritime remedy for

retaliatory discharge of drilling-platform workers (33 U.S.C. § 948a) and thus incorporation of state law was not necessary to fill a significant void or gap in federal law. 776 F.2d at 509.[5]

Moreover, even as interpreted by Newton, the *PLT* test conflicts sharply with the decision below. Under the *PLT* test, state law is not incorporated into federal law under OCSLA—even with respect to controversies arising on a situs covered by

---

[5] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, provides a right of action (against an employer) for employees injured while engaged in maritime employment. Although employees working on OCS drilling platforms are not engaged in "maritime employment" (33 U.S.C. § 902(3), Congress expanded the LHWCA to expressly cover OCS drilling-platform employees when it adopted OCSLA. 43 U.S.C. § 1333(b); *see Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 417-18 (1985). *LeSassier* cited the right of action made available by § 1333(b) as its basis for concluding that Louisiana's retaliatory discharge statute should not be incorporated into federal law. *LeSassier* dismissed the plaintiffs' retaliatory-discharge claim despite the existence of a savings clause in OCSLA. *See* 43 U.S.C. § 1333(f) (the creation of a LHWCA remedy for OCS employees is "not intended" to bar otherwise applicable rights). That result conflicts sharply with the decision below, which cited a similar savings clause in the FLSA as the Ninth Circuit's basis for concluding that application of California wage-and-hour law is "not inconsistent" with federal wage-and-hour law. Pet. App-39.

The LHWCA right of action is limited to claims against employers. Federal law does not (of its own force) create personal-injury rights of action by OCS drilling-platform employees against other types of defendants (*e.g.*, the platform owner). That "gap" in federal law explains *Rodrigue*, in which this Court held that OCS drilling-platform employees could rely on state law to assert personal-injury claims against non-employer defendants. Pet. App-14 n.9 (citing *Rodrigue*, 395 U.S. at 354).

OCSLA—when federal maritime law applies to the controversy (*e.g.*, as in *Continental Oil*, when a vessel collides with a drilling platform). In sharp contrast, the decision below would incorporate all relevant state law, provided only that the state law is "not inconsistent" with maritime law or some other federal law.

No Fifth Circuit decision has ever stated that the court has abandoned *Continental Oil*'s interpretation of § 1333(a)(2). Any assertion that *PLT* overturned *Continental Oil sub silentio* is implausible, both because a Fifth Circuit panel lacks authority to overrule a prior panel decision on its own and because the same federal judge (John R. Brown) wrote both decisions. If Judge Brown had intended to overturn his prior interpretation of § 1332(a)(2), one would reasonably expect that he would have openly expressed that intention.[6]

Perhaps most importantly, the Fifth Circuit has continued to employ its "significant void or gap" language in OCSLA cases in which it applies its *PLT* test. *See, e.g., Tetra Technologies*, 814 F.3d at 738 (stating that OCSLA authorizes incorporation of the law of the adjacent State as surrogate federal law "[w]hen there are 'gaps in the federal law.'") (quoting

---

[6] Nor is it plausible to conclude that Judge Brown authored an opinion that inadvertently conflicted with his prior opinion in *Continental Oil*. Judge Brown was widely regarded as one of the nation's leading authorities on maritime law. Indeed, this Court referred to him as "our leading admiralty authority." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 115 (1971) (Douglas, J., concurring in the judgment).

Rodrigue, 395 U.S. at 356).

In sum, the Fifth Circuit has not retreated from its interpretation of 33 U.S.C. § 1333(a)(2), first announced in *Continental Oil*. Because the Ninth Circuit has adopted a sharply conflicting interpretation of that statute, review of the decision below is warranted to resolve the conflict.

II. THE DECISION BELOW DISRUPTS EMPLOYMENT PRACTICES ADOPTED IN REASONABLE RELIANCE ON CASE LAW INTERPRETING OCSLA

Review is also warranted because the decision below threatens massive retroactive liability for employers who adopted wage-and-hour practices in good-faith reliance on settled OCS law. A body of federal case law had uniformly found state law inapplicable to OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. Not surprisingly, oil companies responded to that case law by adopting OCS employment practices that complied with federal wage-and-hour standards. Yet unless the decision below is overturned, they face claims under state wage-and-hour standards that prior federal-court OCSLA decisions had deemed inapplicable to the OCS.[7]

---

[7] Indeed, the Ninth Circuit conceded that, prior to its decision, every federal district court in California (including the district court in this case) had relied on *Continental Oil* to reject efforts to apply California wage-and-hour law to the OCS. Pet. App-20 n.13 (citing *Williams v. Brinderson Constructors, Inc.*, 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015); *Reyna v. Venoco, Inc.*, No.

As the Ninth Circuit recognized, federal wage-and-hour law—the FLSA and its accompanying regulations, 29 C.F.R. § 785.23—does not require employers to pay employees for sleep and rest hours simply because employees are unable to return home between shifts. In sharp contrast, California wage-and-hour law generally requires employees to be paid for those hours. *Mendiola*, 60 Cal. 4th at 842. Because of the Ninth Circuit's novel ruling that California wage-and-hour law is "applicable" to OCSLA cases, employers now face claims for fines and massive back-pay awards.

Moreover, to avoid future liability, employers will likely be forced by the decision below to significantly restructure their employment practices (certainly in the OCS adjacent to California and perhaps elsewhere as well)—a restructuring that may be unsatisfactory to employers and employees alike. In light of the hardships faced by OCS employees (who generally remain on-site for 14 or more days at a time), their negotiated employment contracts generally include premium hourly compensation (for their 12-hour-per-day on-duty time) and extended time off between their 14-day shifts. If employers will now be required to compensate employees for the entire time they remain on a drilling platform, employers are likely to be forced to alter their employment practices considerably (*e.g.*, reducing hourly wage rates and requiring employees to devote more time to more

---

CV 15-4525 (C.D. Cal. Oct. 23, 2015); *Espinosa v. Beta Operating Co.*, No. CV 15-04659 (C.D. Cal. Oct. 29, 2015); *Jefferson v. Beta Operating Co.*, No. CV 15-04966; and *Garcia v. Freeport-McMoRan Oil & Gas LLC*, No. CV 16-4320 (C.D. Cal. Sept. 16, 2016)).

frequent trips to and from the mainland). Review is warranted to determine whether such disruption of employment relationships is consistent with Congress's mandate that drilling platforms should be governed solely by federal law.

This Court has cautioned that "it is the duty of the federal courts to assure that the importation of state law [into federal law] will not frustrate or interfere with the implementation of national policies." *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)). Congress adopted OCSLA because it determined that the Outer Continental Shelf should be subject to *exclusive* federal control and that it should be up to the federal government to determine the extent to which natural resources under the OCS should be exploited. The federal government has authorized the current, moderate level of off-shore development. The decision below threatens to disrupt that authorized development activity, and invites States that may be unhappy with current development levels to construe their laws in a manner that causes further disruption. By reviewing the decision below, the Court can determine whether Congress intended (when it adopted OCSLA) to incorporate into federal law a substantial body of state law that threatens such major disruptions of well-accepted practices.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal
Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: October 26, 2018

No. 18-389

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

DAVID C. FREDERICK
Counsel of Record
KELLOG, HANSEN, TODD, FIGEL & FREDERICK
1615 M Street, NW
Suite 400
Washington, DC 20036
(202) 326-7900
dfrederick@kellogghansen.com
Counsel for Respondent

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com
Counsel for Petitioner

February 20, 2019

Petition for Writ of Certiorari Filed September 24, 2018
Petition for Writ of Certiorari Granted January 11, 2019

TABLE OF CONTENTS

Relevant Docket Entries, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 15-56352 ..... JA-1

Relevant Docket Entries, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 2:15-cv-02517 ..... JA-7

First Amended Complaint, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 2:15-cv-02517 (Mar. 23, 2015) JA-15

Answer to Plaintiff's First Amended Complaint, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 2:15-cv-02517 (Apr. 3, 2015) JA-36

The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following page in the appendix to the Petition for Certiorari:

Appendix A

Opinion, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Feb. 5, 2018) Pet.App-1

Appendix B

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (Apr. 27, 2018) Pet.App-42

Appendix C

Order, United States Court of Appeals for the Ninth Circuit, *Newton v. Parker Drilling Mgmt. Servs. Ltd.*, No. 15-56352 (May 16, 2018) Pet.App-44

Appendix D

In Chambers Order, United States District Court for the Central District of California, *Newton v. Parker Drilling Mgmt. Servs., Inc.*, No. 15-cv-02517-RGK-AGR (Aug. 10, 2015) Pet.App-46

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-56352

BRIAN NEWTON, an individual,

Plaintiff-Appellant,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD., Erroneously Sued As Parker Drilling Management Services, Inc.,

Defendant-Appellee,

AND

PARKER DRILLING MANAGEMENT SERVICES, INC., a Nevada Corporation,

Defendant.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
09/03/2015	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Mediation Questionnaire due on 09/10/2015. Transcript ordered by 10/05/2015. Transcript due 01/04/2016. Appellant Brian Newton opening brief due 02/16/2016. Appellee Parker

Date Filed	#	Docket Text
		Drilling Management Services, Ltd. answering brief due 03/17/2016. Appellant's optional reply brief is due 14 days after service of the answering brief. [9672080] (JN) [Entered: 09/03/2015 04:33 PM]
		* * *
03/17/2016	7	Submitted (ECF) Opening Brief for review. Submitted by Appellant Brian Newton. Date of service: 03/17/2016. [9906386] [15-56352] (Strauss, Michael) [Entered: 03/17/2016 07:25 PM]
03/17/2016	8	Submitted (ECF) excerpts of record. Submitted by Appellant Brian Newton. Date of service: 03/17/2016. [9906388] [15-56352] (Strauss, Michael) [Entered: 03/17/2016 07:30 PM]
		* * *
08/30/2016	20	Submitted (ECF) Answering Brief for review. Submitted by - Parker Drilling Management Services, Inc.. Date of service: 08/30/2016. [10107212] [15-56352] (Vogel, Karin) [Entered: 08/30/2016 04:10 PM]
08/30/2016	21	Submitted (ECF) excerpts of record. Submitted by - Parker

Date Filed	#	Docket Text
		Drilling Management Services, Inc.. Date of service: 08/30/2016. [10107244] [15-56352] (Vogel, Karin) [Entered: 08/30/2016 04:14 PM]
		* * *
10/18/2016	27	Submitted (ECF) Reply Brief for review. Submitted by Appellant Brian Newton. Date of service: 10/18/2016. [10164648] [15-56352]--[COURT UPDATE: Attached corrected brief. 10/19/2016 by SLM] (Strauss, Michael) [Entered: 10/18/2016 06:33 PM]
		* * *
03/07/2017	37	ARGUED AND SUBMITTED TO RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN. [10346820] (DJW) [Entered: 03/07/2017 02:14 PM]
		* * *
02/05/2018	40	FILED OPINION (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN) VACATED; REMANDED. Judge: MBC Authoring. FILED AND ENTERED JUDGMENT. [10750602]--[Edited: Replaced PDf of opinion (typo corrected).

Date Filed	#	Docket Text
		02/06/2018 by RY] (RMM) [Entered: 02/05/2018 07:12 AM]
* * *		
03/22/2018	45	Filed (ECF) Appellee Parker Drilling Management Services, Ltd. petition for rehearing en banc (from 02/05/2018 opinion). Date of service: 03/22/2018. [10809584] [15-56352] (Holland, Ronald) [Entered: 03/22/2018 05:08 PM]
04/02/2018	46	Submitted (ECF) Amicus brief for review (by government or with consent per FRAP 29(a)). Submitted by Freeport-McMoRan Oil & Gas LLC et al.. Date of service: 04/02/2018. [10821096] [15-56352] (Marwell, Jeremy) [Entered: 04/02/2018 01:59 PM]
* * *		
04/02/2018	49	Submitted (ECF) Amicus brief for review and filed Motion to become amicus curiae. Submitted by Washington Legal Foundation. Date of service: 04/02/2018. [10821522] [15-56352] (Samp, Richard) [Entered: 04/02/2018 03:55 PM]
* * *		

Date Filed	#	Docket Text
04/27/2018	52	Filed Order Amending Opinion (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN)The Washington Legal Foundation's motion for leave to file brief as amicus curiae in support of Appellee's petition for rehearing en banc is GRANTED. The panel votes to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc, and no judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The opinion, filed on February 5, 2018, is amended. On page 40, after the sentence, "We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion[,]" the following footnote is added: "We reserve for the district court's consideration on remand the question whether our holding should be applied retrospectively. See Huson, 404 U.S. at 355." With the foregoing amendment, the petition for rehearing en banc, filed March 22, 2018, is DENIED. No

Date Filed	#	Docket Text
		further petitions for rehearing will be entertained. [10853020] (RMM) [Entered: 04/27/2018 07:22 AM]
05/03/2018	53	Filed (ECF) Appellee Parker Drilling Management Services, Ltd. Motion to stay the mandate. Date of service: 05/03/2018. [10861412] [15-56352] (Holland, Ronald) [Entered: 05/03/2018 09:15 PM]
05/16/2018	54	Filed order (RICHARD A. PAEZ, MARSHA S. BERZON and MORGAN B. CHRISTEN) Defendant-Appellee's motion to stay the issuance of the mandate is GRANTED. Issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court. If such a petition is timely filed, the stay shall remain in effect until the petition is denied or, if granted, pending determination of the cause by the United States Supreme Court. [10875333] (OC) [Entered: 05/16/2018 04:42 PM]
		* * *

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 2:15-cv-02517

BRIAN NEWTON,

v.

PARKER DRILLING MANAGEMENT SERVICES, LTD.

RELEVANT DOCKET ENTRIES

Date Filed	#	Docket Text
04/06/2015	1	NOTICE OF REMOVAL from Santa Barbara, case number 1487051 Receipt No: 0973-15496572 - Fee: $400, filed by Defendant Parker Drilling Management Services, Inc.. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Civil Cover Sheet, # 5 Declaration Whitley) (Attorney Ellen M Bronchetti added to party Parker Drilling Management Services, Inc.(pty:dft)) (Bronchetti, Ellen) (Entered: 04/06/2015)
		* * *
06/12/2015	8	NOTICE OF MOTION AND MOTION for Judgment on the Pleadings as to On the

Date Filed	#	Docket Text
		Pleadings Under FRCP 12(C) or Alternatively for Summary Judgment Under RFCP 56 filed by Defendant Parker Drilling Management Services, Inc., Parker Drilling Management Services, Ltd.. Motion set for hearing on 8/17/2015 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Memorandum Memorandum of Points and Authorities in Support of Motion for Judgment on the Pleadings, # 2 Request for Judicial Notice in Support of Motion for Judgment on the Pleadings, # 3 Exhibit Exhibit 1 to Request for Judicial Notice, # 4 Exhibit Exhibit 2 to Request for Judicial Notice, # 5 Exhibit Exhibit 3 to Request for Judicial Notice, # 6 Exhibit Exhibit 4 to Request for Judicial Notice, # 7 Exhibit Exhibit 5 to Request for Judicial Notice, # 8 Statement of Uncontroverted Facts in Support of Motion for Judgment on the Pleadings, # 9 Declaration Declaration of Steve Maxwell in Support of Motion for Judgment on the Pleadings, # 10 Proposed Order [Proposed] Order Granting

Date Filed	#	Docket Text
		Defendant's Motion for Judgment on the Pleadings)(Attorney Ellen M Bronchetti added to party Parker Drilling Management Services, Inc.(pty:dft)) (Bronchetti, Ellen) (Entered: 06/12/2015)
		* * *
06/29/2015	16	OPPOSITION In Opposition To re: MOTION for Judgment on the Pleadings as to On the Pleadings Under FRCP 12(C) or Alternatively for Summary Judgment Under RFCP 56 8 filed by Plaintiff Brian Newton. (Strauss, Michael) (Entered: 06/29/2015)
		* * *
07/06/2015	18	NOTICE OF MOTION AND MOTION to Certify Class filed by Plaintiff Brian Newton. Motion set for hearing on 8/3/2015 at 09:00 AM before Judge R. Gary Klausner. (Attachments: # 1 Declaration of Michael A Strauss In Support of Motion for Class Certification, # 2 Declaration of Brian Newton In Support of Motion for Class Certification, # 3 Proposed

Date Filed	#	Docket Text
		Order Granting Motion for Class Certification) (Strauss, Michael) (Entered: 07/06/2015)
07/06/2015	19	REPLY In Support Of MOTION for Judgment on the Pleadings as to On the Pleadings Under FRCP 12(C) or Alternatively for Summary Judgment Under RFCP 56 8 filed by Defendant Parker Drilling Management Services, Ltd.. (Bronchetti, Ellen) (Entered: 07/06/2015)
		* * *
07/13/2015	24	to Plaintiff's Motion for Class Certification Yes re: NOTICE OF MOTION AND MOTION to Certify Class 18 Opposition to Class Certification filed by Defendants Parker Drilling Management Services, Inc., Parker Drilling Management Services, Ltd.. (Attachments: # 1 Appendix of Evidence in Support of Defendant's Opposition to Motion for Class Certification, # 2 Declaration of Ellen Bronchetti, # 3 Exhibit A to Bronchetti Declaration, # 4 Exhibit B to Bronchetti Declaration, # 5 Declaration of Joann Hernandez, # 6 Exhibit A to Hernandez Declaration, # 7

Date Filed	#	Docket Text
		Exhibit B to Hernandez Declaration, # 8 Exhibit C to Hernandez Declaration, # 9 Declaration of Steve Wilson, # 10 Exhibit to Wilson Declaration, # 11 Declaration of Dave Pascaloff, # 12 Declaration of Steven Maxwell, # 13 Request for Judicial Notice, # 14 Exhibit A to Request for Judicial Notice, # 15 Proposed Order Granting Request for Judicial Notice, # 16 Objection to Declaration of Brian Newton, # 17 Objection to Plaintiff's Evidence) (Bronchetti, Ellen) (Entered: 07/13/2015)
07/20/2015	25	REPLY In Support Of NOTICE OF MOTION AND MOTION to Certify Class 18 filed by Plaintiff Brian Newton. (Strauss, Michael) (Entered: 07/20/2015)
		* * *
08/10/2015	37	MINUTES (IN CHAMBERS) Order re: Defendant's Motion for Judgment on the Pleadings, or alternatively, for Summary Judgment 8 by Judge R. Gary Klausner. The Court GRANTS Defendant's Motion for Judgment on the Pleadings.

Date Filed	#	Docket Text
		Refer to the Court's order for details. MD JS-6. Case Terminated. (pso) (Entered: 08/10/2015)
09/03/2015	38	NOTICE OF APPEAL to the 9th CCA filed by Plaintiff Brian Newton. Appeal of Order on Motion for Judgment on the Pleadings, 37 (Appeal fee of $505 receipt number 0973-16381909 paid.) (Strauss, Michael) (Entered: 09/03/2015)
09/03/2015	39	NOTIFICATION by Circuit Court of Appellate Docket Number 15-56352, 9th Circuit regarding Notice of Appeal to 9th Circuit Court of Appeals 38 as to plaintiff Brian Newton. (mat) (Entered: 09/04/2015)
02/05/2018	40	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 38 filed by Brian Newton. CCA # 15-56352. We vacate the order dismissing Newton's claims and remand to the district court for further proceedings consistent with this opinion. VACATED and REMANDED. (bp) (Entered: 02/07/2018)

Date Filed	#	Docket Text
02/05/2018	41	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 38 filed by Brian Newton. CCA # 15-56352. At the direction of the Court, costs are hereby taxed against appellee. (bp) (Entered: 02/07/2018)
02/12/2018	42	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 38 filed by Brian Newton. CCA # 15-56352. Defendant-Appellee's unopposed motion for an extension of time to file a petition for rehearing en banc is granted.(mat) (Entered: 02/14/2018)
04/27/2018	43	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 38 filed by Brian Newton. CCA # 15-56352. The Washington Legal Foundation's motion for leave to file brief as amicus curiae in support of Appellee's petition for rehearing en banc is GRANTED. The opinion, filed on February 5, 2018, is amended. [See complete

Date Filed	#	Docket Text
		document for all details.] (mat) (Entered: 04/27/2018)
05/16/2018	44	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 38 filed by Brian Newton. CCA # 15-56352. Defendant-Appellee's motion to stay the issuance of the mandate is GRANTED. Issuance of the mandate is stayed pending the filing of a petition for a writ of certiorari in the United States Supreme Court. If such a petition is timely filed, the stay shall remain in effect until the petition is denied or, if granted, pending determination of the cause by the United States Supreme Court. (car) (Entered: 05/17/2018)
		* * *

First Amended Complaint (filed Mar. 23, 2015)

TO ALL INTERESTED PARTIES HEREIN AND TO THEIR ATTORNEYS OF RECORD:

COME NOW, PLAINTIFF Brian Newton ("Plaintiff") and the putative class, and submit the following Complaint against PARKER DRILLING MANAGEMENT SERVICES, INC. and DOES 1 through 100, inclusive (collectively "Defendants"), and each of them as follows:

1. At all times herein mentioned, Plaintiff Brian Newton was an employee of Defendants, working in the state of California, within the last four (4) years.

2. Unless otherwise stated, at all times herein mentioned Plaintiff was an individual residing in the County of Ventura, State of California. Plaintiff became a resident of Harris County, Texas in or about November 2014.

3. At all times herein mentioned, Plaintiff is informed and believes and, based on such information and belief, thereon alleges that Parker Drilling Management Services, Inc., is a Nevada Corporation that does business in the County of Santa Barbara, California.

4. The true names and capacities, whether individual, corporate, associate, representative or otherwise, of the defendants identified herein as Does 1 through 100, inclusive, are unknown to Plaintiff, who therefore sue these defendants by said fictitious names. Plaintiff will amend this Complaint to allege the true names and capacities of Does 1 through 100 when they have been ascertained. Does 1 through 100

are in some manner legally responsible for the wrongs and injuries alleged herein.

5. Each of the Defendants acted as the agent or employee of the others and each acted within the scope of that agency or employment.

6. Venue is appropriate in Santa Barbara County Superior Court because the unlawful employment practices complained of herein occurred in the City of Goleta, California, County of Santa Barbara, and in the offshore waters in the Santa Barbara Channel.

CLASS ACTION ALLEGATIONS

7. Plaintiff brings the first three causes of action stated herein on his own behalf and on behalf of all persons similarly situated. The class consists of all hourly employees of Parker Drilling Management Services, Inc., who, at any time within four years from the date of filing of this lawsuit, worked on oil platforms off of the California coast for periods of 24 hours or more (hereinafter the "Putative Class"). The Putative Class represents over 25 persons and is so numerous that the joinder of each member of the putative class is impracticable.

8. There is a well-defined community of interest in the questions of law and fact affecting the classes Plaintiff represents. The Putative Class members' claims against Defendants involve questions of common or general interest, in that each was employed by Defendants, and each was not paid wages owed based on the same failure to compensate for all hours during which they were subject to the control of Defendants, including hours in excess of their scheduled shifts and during meal periods. These questions are such that proof of a state of facts

common to the members of the Putative Class will entitle each member to the relief requested in this complaint.

9. The members of the Putative Class that Plaintiff represents have no plain, speedy or adequate remedy at law against Defendants, other than by maintenance of this class action, because Plaintiff is informed and believes, and on such information and belief alleges, that the damage to each member of the Putative Class is relatively small and that it would be economically infeasible to seek recovery against Defendants other than by a class action.

10. Plaintiff will fairly and adequately represent the interest of the Putative Class, because Plaintiff is a member of the Putative Class, and Plaintiff's claims are typical of those in the Putative Class'.

11. Plaintiff was employed by Defendants from approximately January 25, 2013 to approximately January 15, 2015.

12. Plaintiff worked on an oil platform off of the California coastal waters. His shift typically lasted 14 days. He received pay for only 12 hours each day while on the oil platform. He did not receive any compensation for 12 hours while on the platform each day. He could not reasonably leave the platform during his 14-day shift.

FIRST CAUSE OF ACTION

Minimum Wage Violations

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

13. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as if fully set forth herein.

14. California law requires payment of at least the state-mandated minimum wage for all hours worked by non-exempt employees. (See Lab. Code, §§ 1194, 1197.) Hourly wages cannot be averaged out to cover hours worked during which no compensation was paid. (See *Armenta v. Osmose* (2005) 135 Cal.App.4th 314, 322-24.) Time during which a worker cannot leave his or her worksite, even sleeping time, is considered hours worked under California law. (*Mendiola v. CPS Security Solutions, Inc.* (Cal., Jan. 8, 2015) 15 Cal. Daily Op. Serv. 203.)

15. Plaintiff and the Putative Class regularly worked hours for which they were not paid the minimum wage. Defendants' minimum wage violations include, but are not limited to, the failure to pay any wages whatsoever to Plaintiff and the Putative Class for 12 hours each workday.

16. Plaintiff seeks such minimum wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

17. The exact amount of minimum wages owed will not be fully ascertained until discovery is

completed. Until Defendants produce the necessary documents for an accounting, Plaintiff is unable to determine the exact amount of minimum wages owed.

18. Labor Code section 218.6 states, "[I]n any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2." Plaintiff seeks such interest on all minimum wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

19. Plaintiff seeks liquidated damages in an amount equal to the minimum wages due to him and the Putative Class under Labor Code section 1194.2.

20. Pursuant to Labor Code section 1194, Plaintiff requests the Court to award Plaintiff's reasonable attorney's fees and costs incurred in this action.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For minimum wages owed according to proof;

2. For prejudgment interest pursuant to Labor Code section 218.6 and Civil Code sections 3288 and 3291 on all amounts claimed;

3. For liquidated damages in an amount equal to the unpaid minimum wages owed under Labor Code section 1194.2;

4. For attorney's fees and costs pursuant to Labor Code section 1194;

5. For costs of suit; and

6. For any other and further relief that the Court considers just and proper.

SECOND CAUSE OF ACTION

Pay Stub Violations

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

27. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as if fully set forth herein.

28. California Labor Code section 226 provides:

> Every employer shall, semimonthly or at the time of each payment of wages, furnish each of his or her employees, either as a detachable part of the check, draft, or voucher paying the employee's wages, or separately when wages arc paid by personal check or cash, an itemized statement in writing showing (1) gross wages earned, (2) total hours worked by the employee, except for any employee whose compensation is solely based on a salary and who is exempt from payment of overtime under subdivision (a) of Section 515 or any applicable order of the Industrial Welfare Commission, (3) the number of piece-rate units earned and any applicable piece rate if the employee is paid on a piece-rate basis, (4) all deductions, provided, that all deductions made on written orders of the employee may be aggregated and shown as

> one item, (5) net wages earned, (6) the inclusive dates of the period for which the employee is paid, (7) the name of the employee and his or her social security number, (8) the name and address of the legal entity that is the employer, and (9) all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.

29. In this case, Defendants have failed to provide such wage deduction statements to Plaintiff and the Putative Class in that their wage deduction statements do not include, without limitation, their gross wages earned, all hours worked, net wages earned, or all applicable hourly rates in effect during the pay period, the corresponding number of hours worked at each hourly rate by the employee, and the name and address of the legal entity that is the employer. Pursuant to Labor Code section 226(e), damages arc appropriate. At this time, Plaintiff believes and alleges that he and the Putative Class are owed the maximum allowable penalty under section 226(e) because Defendants failed to provide adequate paycheck stubs. However, the exact amount of damages under Labor Code section 226(e) will not be fully ascertained until discovery is completed. Until Defendants produce the necessary documents for an accounting, Plaintiff is unable to determine the exact amount of damages under Labor Code section 226(e).

30. Pursuant to Labor Code section 226(e), Plaintiff requests the court to award Plaintiff's

reasonable attorney's fees and costs incurred by Plaintiff in this action.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For statutory penalties, pursuant to law;

2. For reasonable attorneys' fees pursuant Labor Code section 226;

3. For costs of suit; and

4. For any other and further relief that the Court considers just and proper.

THIRD CAUSE OF ACTION

Unfair Competition

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

31. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as though fully set forth herein.

32. This cause of action is being brought pursuant to California Business and Professions Code section 17200 et seq. and California case law including *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.App.4th 163.

33. It is alleged that Defendants have willfully failed to pay Plaintiff and the Putative Class, the state-mandated minimum, overtime, doubletime, and meal period premium wages for all hours worked. The failure to pay such wages constitutes an unfair

business practice under California Business and Professions Code section 17200.

34. As a result of the conduct of Defendants, Defendants profited from breaking the law. Plaintiff and the Putative Class seek disgorgement of this unlawfully obtained benefit (plus interest thereon) for the four-year period measured backward from the date of filing of the initial Complaint in this matter.

35. California Business and Professions Code section 17203, under the authority of which a restitutionary order may be made, provides:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use of employment by any person or any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition. Any person may pursue representative claims or relief on behalf of others only if the claimant meets the standing requirements of Section 17204 and complies with Section 282 of the Code of Civil Procedure, but these limitations do not apply to claims brought under his chapter by the Attorney General, or any district attorney, county counsel, city attorney, or city prosecutor in this state.

36. As a result of the alleged aforesaid actions, Plaintiff and the Putative Class have suffered injury in fact and have lost money as a result of such unfair competition.

37. In this case, it is requested that this Court order such restitution.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For an equitable order, ordering Defendants to pay all Putative Class members all wages, interest, and penalties they are owed;

2. For an appointment of a receiver to perform an accounting of all monies owed to these employees;

3. For any and all injunctive relief this Court deems necessary pursuant to Business and Professions Code section 17203;

4. For attorneys' fees and costs;

5. For prejudgment interest on all amounts owed pursuant to Civil Code sections 3288 and 3291; and

6. For any other and further relief that the Court considers proper.

FOURTH CAUSE OF ACTION

Failure To Timely Pay Wages At Termination

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

38. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as if fully set forth herein.

39. Labor Code section 201 provides, "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately." Defendants did not pay immediately all wages earned and unpaid to Plaintiff and the Putative Class upon discharge. Defendants have refused and continue to refuse to pay said wages.

40. Pursuant to Labor Code section 203, Defendants have willfully failed to pay without abatement or reduction, in accordance with Labor Code sections 201 and 202 all of the minimum, overtime, meal period, and doubletime wages of the Plaintiff and the Putative Class, as herein alleged. Defendants are aware that they owe the wages claimed by Plaintiff and the Putative Class, yet Defendants willfully failed to make payment. As a result, Plaintiff seeks wages and waiting-time penalties pursuant to Labor Code section 203 on behalf of himself and the Putative Class. These penalties consist of up to 30 days of pay for Plaintiff Putative Class at their regular rates of pay.

41. Plaintiff and the Putative Class have been available and ready to receive wages owed to them.

42. Plaintiff and the Putative Class have never refused to receive any payment, nor have they been absent from their regular places of residence.

43. Defendants' failure to pay wages due and owing Plaintiff and the Putative Class, as indicated in prior paragraphs, was willful; Defendants have knowingly refused to pay any portion of the amount due and owning Plaintiff and the Putative Class.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For waiting-time penalties under Labor Code section 203;

2. For costs of suit; and

3. For any other and further relief that the Court considers just and proper,

FIFTH CAUSE OF ACTION

Failure To Provide Lawful Meal Periods

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

46. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as if fully set forth herein.

47. California law provides that no employer shall employ any person for a work period of more than five hours without a meal period of not less than 30 minutes. (Lab. Code §§ 226.7, 512.)

48. If an employer fails to provide an employee a legally mandated meal period, the employer sha!l pay the employee one hour of pay at the employee's regular rate of compensation for each five hours of work that the meal period is not provided.

49. Defendants have intentionally and improperly denied meal periods to Plaintiff and the Putative Class in violation of Labor Code sections 226.7 and 512.

50. At all times relevant hereto, Plaintiff and the other members of the Putative Class have worked

more than five hours in a workday (and often more than ten, fifteen hours, and twenty hours). At all relevant times hereto, Defendants have failed to provide meal periods for every five-hour work period as required by California law.

51. Plaintiff and the other members of the Putative Class are informed and believe, and based upon that information and belief allege, that Defendants know or should have known that Plaintiff and the Putative Class were entitled to meal periods but purposely elected not to provide these mandated periods.

52. Plaintiff seeks meal period premium wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

53. The exact amount of meal period premium wages owed will not be fully ascertained until discovery is completed. Until Defendants produce the necessary documents for an accounting, Plaintiff is unable to determine the exact amount of meal period premium wages owed.

21. Labor Code section 218.6 states, "[I]n any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2." Plaintiff seeks such interest on all meal period premium wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For meal period premiums in an amount according to proof;

2. For costs of suit; and

3. For any other and further relief that the Court considers just and proper.

SIXTH CAUSE OF ACTION

Failure To Pay Overtime And Doubletime Premium Wages

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

58. Plaintiff incorporates by reference and re-alleges each and every one of the allegations contained in the preceding and foregoing paragraphs of this Complaint as if fully set forth herein.

59. California law requires payment of overtime premium pay for all hours worked by non-exempt employees in excess of eight in one day or 40 hours in one week and for the first eight hours on the seventh-straight day of work in one workweek. (Lab. Code, § 510.) It further requires payment of doubletime premium pay for all hours worked by non-exempt employees in excess of twelve hours in one day or in excess of eight hours on the seventh-straight day of work in a single workweek. (*Ibid.*)

60. Time during which a worker cannot leave his or her worksite, even sleeping time, is considered hours worked under California law. (*Mendiola v. CPS*

Security Solutions, Inc. (Cal., Jan. 8, 2015) 15 Cal. Daily Op. Serv. 203.)

61. Plaintiff and the Putative Class regularly worked hours for which they were not paid the overtime or doubletime premium wages. Defendants' overtime and doubletime wage violations include, but are not limited to, the failure to pay any wages whatsoever to Plaintiff and the Putative Class for 12 hours each workday, which time lawfully was considered overtime and/or doubletime hours worked.

62. Plaintiff and the Putative Class seek such overtime and doubletime premium wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

63. The exact amount of overtime and doubletime premium wages owed will not be fully ascertained until discovery is completed. Until Defendants produce the necessary documents for an accounting, Plaintiff is unable to determine the exact amount of overtime and doubletime premium wages owed.

64. Labor Code section 218.6 states, "[I]n any action brought for the nonpayment of wages, the court shall award interest on all due and unpaid wages at the rate of interest specified in subdivision (b) of Section 3289 of the Civil Code, which shall accrue from the date that the wages were due and payable as provided in Part 1 (commencing with Section 200) of Division 2." Plaintiff seeks such interest on all overtime and doubletime premium wages owed to them for the three-year period measured backward from the date of the filing of the initial Complaint in this matter.

65. Pursuant to Labor Code section 1194, Plaintiff requests the Court to award Plaintiffs reasonable attorney's fees and costs incurred in this action.

WHEREFORE, Plaintiff and the Putative Class demand judgment against Defendants, and each of them, as follows:

1. For overtime and doubletime premium wages owed according to proof;

2. For prejudgment interest pursuant to Labor Code section 218.6 and Civil Code sections 3288 and 3291 on all amounts claimed;

3. For attorney's fees and costs pursuant to Labor Code section 1194;

4. For costs of suit; and

5. For any other and further relief that the Court considers just and proper.

SEVENTH CAUSE OF ACTION

Civil Penalties Under The Private Attorneys General Act Of 2004

(Action Brought By Plaintiff On Behalf Of Himself And The Putative Class Against All Defendants)

58. Plaintiff refers to paragraphs 1 through 57, and incorporates same by reference as though fully set forth at length.

59. It is alleged that Defendants intentionally denied Plaintiff and his similarly situated co-workers wages that should have been paid and have violated Labor Code provisions.

60. Pursuant to Labor Code sections 2698 et seq., Plaintiff is entitled to recover civil penalties on behalf

of himself and other persons who are or were employed by the alleged violator and against whom one or more of the alleged violations was committed. Plaintiff is therefore pursuing civil penalties for violations of the Labor Code sections set forth herein.

61. One or more of the alleged violations set forth herein was committed against Plaintiff, and Plaintiff is therefore an "aggrieved employee" under Labor Code Section 2699(c), which provides in relevant part, "(c) For purposes of this part, "aggrieved employee" means any person who was employed by the alleged violator and against whom one or more of the alleged violations was committed."

62. Labor Code section 200 defines "wages" as including all amounts for labor performed by employers of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.

63. Labor Code section 201 requires immediate payment of all wages owed at the termination of employment. It is alleged that within the last year, Defendants' employees in California have been terminated and have not received all wages owed at their termination. There is no civil penalty associated with violation of section 201, but Plaintiff seeks civil penalties on behalf of himself and all others similarly situated under Labor Code section 2699, subd. (f).

64. Labor Code section 202 requires payment of all wages owed within 72 hours of the resignation of an employee, unless the employee gives more than 72-hours notice, in which case wages are owed at the employee's resignation. It is alleged that within the

last year, Defendants' employees in California have resigned and have not received all overtime premium pay owed in a timely fashion after their resignation. There is no civil penalty associated with violation of section 202, but Plaintiff seeks civil penalties on behalf of himself and all others similarly situated tinder Labor Code section 2699, subd. (f).

65. Labor Code section 204 makes wages due no less frequently than twice a month for non-exempt employees for work performed each pay period. Defendants have violated section 204 with respect to Plaintiff and his similarly situated coworkers by not paying them all wages due for work performed each pay period. Plaintiff seeks civil penalties on behalf of himself and all other similarly situated under Labor Code section 210.

66. Labor Code section 219 provides that an employer may not circumvent by way of private agreement the requirements of the wage-and-hour laws of the Labor Code. To the extent that Defendants will argue that these employees agreed to forfeit their travel time and/or other wages, Defendants will have violated Labor Code section 219. There is no civil penalty associated with violation of section 219, but Plaintiff seeks civil penalties on behalf of himself and all others similarly situated under Labor Code section 2699, subd. (f).

67. Labor Code section 226, subdivision (a), requires a California employer to include very specific information on an employee's paycheck stub. The required information includes the total number of overtime hours worked and the correct rates of pay. Lab. Code § 226(a). Subdivision (e) sets forth statutory

penalties for the violation of section 226(a). Plaintiff seeks to recover said penalties on behalf of himself and all others similarly situated.

68. Labor Code section 226.3 sets forth civil penalties for violation of section 226, subdivision (a). Plaintiff seeks said penalties against Defendants on behalf of himself and all other similarly situated employees for violation of section 226, subdivision (a).

69. Labor Code section 226.7 provides that an employer must compensate a non-exempt employee with one hour of pay for each required meal period that it does not provide. Defendants violated this statute by not paying this meal period premium pay to Plaintiff and his co-workers when they were not provided with 30-minute, off-duty meal periods.

70. Labor Code section 510 provides that an employer shall pay overtime premium wages to non-exempt employees who work over eight hours in a workday or over 40 hours in a workweek. Defendants violated Labor Code section 510 by not paying overtime premium wages to non-exempt employees who worked over eight hours in a day and Labor Code section 510.

71. Labor Code section 512 provides that an employer shall provide its non-exempt employees with one off-duty meal period for each five-hour work period. Defendants violated Labor Code section 512 by not providing off-duty meal periods to its non-exempt employees for every five-hour work period.

72. Labor Code section 558 provides for civil penalties against an employer who violates sections 510 and 512. Plaintiff seeks said penalties against Defendants on behalf of himself and all other similarly

situated employees for violation of sections 510 and 512.

73. Labor Code section 1197 requires that employers may not pay less than the mandated minimum wage. Defendants violated section 1197 by not paying Plaintiff and his similarly situated coworkers at least the minimum wage for all hours worked. The civil penalty for violations of section 1197 is enumerated in Labor Code section 1197.1. Plaintiff seeks said penalties against Defendants on behalf of himself and all other similarly situated employees for violations of section 1197.

74. Plaintiff also seeks any civil penalties allowable under the Labor Code that arise out of the same set of operative facts as the claims made in this complaint.

75. Plaintiff has fully complied with the statutory requirements of Labor Code section 2699.3. Plaintiff gave notice by a letter dated January 28, 2015 and delivered by certified mail to the California Labor and Workforce Development Agency and the employer of the specific provisions of the Labor Code alleged to have been violated, including the facts and theories to support the alleged violations. On March 6, 2015, Plaintiff received notice dated March 2, 2015 from the Labor and Workforce Development Agency indicating its intent not to pursue an investigation or action for penalties against Defendants.

76. Defendants' failure to pay wages due and owing to Plaintiff and those similarly situated, as indicated in prior paragraphs, was willful. Defendants have knowingly refused to pay any portion of the amount due and owing Plaintiff and his similarly

situated employees. Further, Defendants have not taken any actions to "cure" the Labor Code violations pursuant to California Labor Code section 2699 et seq.

77. By failing to pay Plaintiff and the current and past aggrieved employees, Defendants have violated numerous California Labor Code provisions, all as set forth hereinabove. Civil penalties are therefore appropriate.

WHEREFORE, Plaintiff demands judgment against Defendants, and each of them, as follows:

1. For civil penalties for each aggrieved employee, for each violation alleged aforesaid, to be distributed in accordance with Labor Code section 2699;

2. For attorneys' fees and costs pursuant to Labor Code section 2699(g);

3. For any other and further relief that the Court considers just and proper.

DATED: March 6, 2015 PALAY LAW FIRM, APC

By: [handwritten: signature]
Michael A. Strauss
Andrew C. Ellison
Attorneys for Plaintiff

Answer to Plaintiff's First Amended Complaint (filed Apr. 3, 2015)

TO PLAINTIFF AND HIS COUNSEL OF RECORD:

Defendant Parker Drilling Management Services, Ltd. ("Defendant"), erroneously sued as "Parker Drilling Management Services, Inc.," for itself alone and for no others, hereby answers the First Amended Complaint of Plaintiff Brian Newton ("Plaintiff") as follows:

PROCEDURAL HISTORY

On March 6, 2015, Defendant was served with a Complaint in this matter that was filed with the Court on February 17, 2015. The Complaint erroneously names "Parker Drilling Management Services, Inc.," rather than the correct name of the company: Parker Drilling Management Services, Ltd. The original Complaint contained five causes of action. On March 26, 2015, Defendant was served with Plaintiffs First Amended Complaint ("FAC"), which was filed with the Court on March 23, 2015, and added two new causes of action to the original five. As it would now appear unnecessary Lo answer Plaintiff's original Complaint, Defendant hereby answers the FAC.

GENERAL DENIAL

Pursuant to the provisions of Section 431.30(d) of the California Code of Civil Procedure, Defendant denies, generally and specifically, each and every allegation, statement, and matter, and each purported cause of action contained in Plaintiff's FAC, and, without limiting the generality of the foregoing,

further denies that Plaintiff was damaged in any way at all by reason of any ads or omissions of Defendant.

AFFIRMATIVE DEFENSES

In further answer to Plaintiff's unverified FAC, Defendant alleges the following additional defenses. In asserting these defenses, Defendant does not assume the burden of proof as to matters that, pursuant to law, are Plaintiff's burden to prove.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

1. The FAC, and each and every purported cause of action alleged therein, fails to state facts sufficient to constitute a cause of action upon which relief can be granted against Defendant.

SECOND AFFIRMATIVE DEFENSE

(Failure to Exhaust)

2. Defendant is informed and believes, and based upon such information and belier alleges, that the FAC, and each and every purported cause of action alleged therein, is barred, in whole or in part, because Plaintiff failed to timely and completely exhaust their requisite administrative and/or contractual remedies available to them under the California Labor Code or other provisions or law prior to commencing this action.

THIRD AFFIRMATIVE DEFENSE

(Federal Preemption)

3. Defendant alleges that, to the extent Plaintiff's claims involve conduct that is, or seeks remedies that are, governed or regulated by federal law, such claims arc preempted.

FOURTH AFFIRMATIVE DEFENSE

(Preemption – Supremacy Clause)

4. Defendant asserts that the Supremacy Clause of the United States Constitution bars Plaintiff's claims. *Lorrilard Tobacco Co. v. Reilly* (2001) 533 U.S. 525.

FIFTH AFFIRMATIVE DEFENSE

(Non-Certifiable Class)

5. Plaintiff cannot satisfy the requirements of California Code of Civil Procedure Section 382 because individual questions of fact and law predominate over common questions. Plaintiff's claims are not typical of those belonging to the putative class members, the class is not sufficiently numerous, and/or other class requirements cannot be satisfied. Accordingly, this action is not properly brought as a class action.

SIXTH AFFIRMATIVE DEFENSE

(Inadequacy of Class Representative)

6. Defendant is informed and believes, and based upon such information and belief alleges, that Plaintiff is not a proper representative of the class he purports to represent and. accordingly, this action is not properly brought as a class action.

SEVENTH AFFIRMATIVE DEFENSE

(Lack of Superiority)

7. Defendant is informed and believes, and based upon such information and belief alleges, that the class action procedure is not the superior method for adjudicating Plaintiff's claims or the claims of the alleged class and, accordingly, this action is not properly brought as a class action.

EIGHTH AFFIRMATIVE DEFENSE

(Lack of Standing)

8. Defendant is informed and believes, and based upon such information and belief alleges, that Plaintiff lacks standing to assert any purported cause of action alleged in the FAC and lacks standing lo represent the putative class.

NINTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

9. The FAC, and each and every purported cause of action alleged therein, is barred by the applicable statutes of limitations, including but not limited to, California Labor Code Section 203; California Code of Civil Procedure Sections 337, 338, 339, 340 and 343; and California Business & Professions Code Section 17208.

TENTH AFFIRMATIVE DEFENSE:

(Laches)

10. Defendant is informed and believes, and based upon such information and belief alleges, that the FAC, and each and every purported cause or action alleged therein, is barred by the doctrine of laches, in that Plaintiff unreasonably delayed in bringing the action because he did not act within a reasonable time in seeking the wages at issue, or otherwise reporting any alleged violation of wage and hour laws, and has unreasonably delayed in the filing of this lawsuit, causing Defendant to suffer prejudice.

ELEVENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

11. Defendant is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, the FAC and each cause of action set forth therein are barred by the doctrine of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

(Waiver)

12. Defendant is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, the FAC and each cause of action set forth therein are barred by the doctrine of waiver.

THIRTEENTH AFFIRMATIVE DEFENSE

(Estoppel)

13. Defendant is informed and believes that a reasonable opportunity for investigation and discovery will reveal, and on that basis alleges, the FAC and each cause of action set forth therein are barred by the doctrine or estoppel.

FOURTEENTH AFFIRMATIVE DEFENSE

(Justification)

14. Any acts alleged to have been committed by Defendant were committed in the exercise of good faith, with probable cause, were not arbitrary or capricious, were based upon legitimate factors, and were reasonable and justified under the circumstances.

FIFTEENTH AFFIRMATIVE DEFENSE

(Adequate Remedy at Law)

15. Defendant alleges Plaintiff and/or the putative class members are not entitled to equitable relief insofar as they have adequate remedies at law.

SIXTEENTH AFFIRMATIVE DEFENSE

(Set-Off/Offset/Recoupment)

16. The FAC, and each and every purported cause of action alleged therein, is subject to setoff, offset and/or recoupment to the extent Plaintiff has already been compensated for the hours worked for which he seeks compensation here.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Labor Code § 203 – No Willful or Intentional Violation)

17. Defendant alleges that, even assuming *arguendo* Plaintiff and/or the putative class members are entitled to any additional compensation, it has not willfully or intentionally failed to pay any such additional compensation to Plaintiff and/or the putative class members, within the meaning and scope of California Labor Code section 203.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Bona fide Dispute)

18. Defendant alleges there exists a *bona fide* dispute as to whether any further compensation is actually due to Plaintiff and/or the putative class members and, if so, the amount thereof.

NINETEENTH AFFIRMATIVE DEFENSE

(Labor Code§ 226 – No Intentional Failure)

19. Defendant alleges that, even assuming arguendo Plaintiff and/or the putative class members were not provided with a proper itemized statement of wages and deductions, Plaintiff and the putative c lass members are not entitled to recover damages or penalties because Defendant's alleged failure to comply with California Labor Code section 226(a) was not a "knowing and intentional failure" under California Labor Code section 226(c).

TWENTIETH AFFIRMATIVE DEFENSE

(Lack of Specificity)

20. Defendant alleges Plaintiff has failed to allege special damages with requisite specificity.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Res Judicata, Bar and Merger, Settlement/Release)

21. The causes of action set forth in the FAC and in each of the purported causes of action alleged therein arc subject to settlement/release agreements, which constitute a complete or partial bar to the present action, and/or the doctrine of res judicata.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Collateral Estoppel)

22. The FAC, and each and every purported cause of action alleged therein, is barred, in whole or in part by the doctrine or collateral estoppel.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Civil Penalties Unconstitutional – Due Process and Separation of Powers)

23. The penalties sought in Plaintiff's FAC violate the Due Process and Separation of Powers Clauses of the United States and California Constitutions. *Lockyer v. R.J. Reynolds Tobacco Co.*, 37 Cal. 4th 707 (2005); *Rainer v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972).

TWENTY-FOURTH AFFIRMATIVE DEFENSE

(After-Acquired Evidence)

24. Defendant is informed and believes, and based upon such information and belief alleges, that Plaintiff is barred, in whole or in part, from recovery or any damages based upon the doctrine of after-acquired evidence.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Uncertainty)

25. Defendant alleges the FAC, and the claims asserted therein, are uncertain.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Mitigation of Damages)

26. Defendant is informed and believes that, Plaintiff, and any purported class members, have failed to exercise reasonable care to mitigate their damages, if any were suffered, and that their right to recover against Defendant should be reduced and/or eliminated by such a failure.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(Violation or Due Process)

27. Defendant alleges that certification of a class, and the prosecution of a representative action on behalf of the general public under California Business and Professions Code section 17200 *et seq.*, as applied to the facts and circumstances of this case, would constitute a denial or Defendant's due process rights, both substantive and procedural, in violation of the Fourteenth Amendment to the United States Constitution and the California Constitution.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Breach of Duty)

28. Defendant is informed and believes that a reasonable opportunity for investigation and discovery will reveal and, on that basis, alleges Plaintiff's claims, and those or any putative class members, are barred by their own breach of the duties owed to Defendant under California Labor Code section 2854, 2856, 2857, 2858 and/or 2859.

TWENTY-NINTH AFFIRMATIVE DEFENSE

(No Penalties – Good Faith Dispute)

29. Defendant is informed and believes that further investigation and discovery will reveal, and on that basis alleges, that any violation of the Labor Code or an Order or the Industrial Welfare Commission was an act or omission made in good faith and Defendant had reasonable grounds for believing that its wage payment practices complied with applicable laws and that any such act or omission was not a violation of the Labor Code, the common law or any Order of the Industrial Welfare Commission such that Plaintiff

and/or the putative class members are not entitled to any penalties or damages in excess or any wages/overtime which might be found to be due. Specifically, Plaintiff cannot recover Labor Code Section 203 or Labor Code Section 226(e) civil penalties because any alleged failure to pay wages or provide compliant wage statements was based on a good faith dispute regarding the applicable law or facts.

THIRTIETH AFFIRMATIVE DEFENSE

(Failure to State a Claim for Attorneys' Fees and Costs)

30. Defendant alleges that the FAC fails to state a claim for attorneys' fees under Labor Code section 226. Code of Civil Procedure 1021.5, Business and Professions Code section 17200, *et seq.*, or any other basis.

THIRTY-FIRST AFFIRMATIVE DEFENSE

(Unconstitutional Wage Order)

31. Defendant alleges that the FAC and each cause or action therein, or some of them, arc barred because the applicable wage orders of the Industrial Welfare Commission arc unconstitutionally vague and ambiguous and may violate Defendant's rights under the United States Constitution and the California Constitution as to, among other things, due process or law.

THIRTY-SECOND AFFIRMATIVE DEFENSE

(Failure by Plaintiffs to Follow Directions)

32. Defendant alleges that it is informed and believes that a reasonable opportunity for

investigation and discovery will reveal, and on that basis alleges, that any failure to comply with Defendant's work-time recording and overtime polices and requirements, was the result or failure by Plaintiff and/or the putative class members to follow Defendant's reasonable instructions.

THIRTY-THIRD AFFIRMATIVE DEFENSE

(No Harm Suffered)

33. Defendant is informed and believes that further investigation and discovery will reveal, and on that basis alleges, that Plaintiff has not suffered and will not suffer irreparable harm or any harm as a result of any of the alleged conduct of Defendant.

RESERVATION OF RIGHT TO AMEND ANSWER

Defendant hereby gives notice that they intend to rely on such other and further defenses as may become available during discovery in this action and reserve the right to amend the Answer to assert any such defenses.

PRAYER

WHEREFORE, Defendant prays for judgment as follows:

1. That the FAC be dismissed with prejudice in its entirety;

2. That Plaintiff takes nothing by reason of the FAC;

3. That Defendant be awarded its costs of suit and reasonable attorneys' fees to the extent provided by law; and,

4. For such other and further relief as the Court may deem just and proper.

Dated: April 3, 2014

SHEPPARD, MULLIN, RICHTER & HAPTON LLP

By [handwritten: signature]
Ronald J. Holland
Ellen M. Bronchetti
Matthew C. Lewis
Attorneys for Defendant

No. 18-389

In the

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
LAURA WOLK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 20, 2019

QUESTION PRESENTED

In the Outer Continental Shelf Lands Act (OCSLA), Congress declared federal law to be the exclusive source of law on the Outer Continental Shelf (OCS). To fill the gaps in the coverage of federal law, Congress provided that the law of the adjacent state would be borrowed as federal law, to the extent that such state law is "applicable" and "not inconsistent with" existing federal law. Consistent with this Court's decisions, the Fifth Circuit has long held that state law is not borrowed as surrogate federal law under OCSLA unless there is a gap in federal law, as with a garden-variety contract claim. In the decision below, the Ninth Circuit expressly disagreed with the Fifth Circuit and held that state law should be borrowed as federal law governing the OCS whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, regardless of whether there is a gap in federal law. It thus held that California's wage-and-hour laws apply to claims filed by workers on drilling platforms on the OCS, even though the Fair Labor Standards Act already provides a comprehensive set of federal rights and remedies. The result is wholly unanticipated and potentially massive liability for OCS operators that fully complied with the FLSA.

The question presented is:

Whether, under OCSLA, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

CORPORATE DISCLOSURE STATEMENT

Parker Drilling Management Services, Ltd.'s parent company and sole member is wholly owned by Parker Drilling Company, which is a publicly traded company.

TABLE OF CONTENTS

QUESTION PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES v
INTRODUCTION 1
OPINIONS BELOW 3
JURISDICTION 3
STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF THE CASE 3
A. The Outer Continental Shelf And OCSLA 3
B. The Fair Labor Standards Act 7
C. Factual and Procedural Background 9
SUMMARY OF ARGUMENT 14
ARGUMENT 18
I. The FLSA, Not California Wage-And-Hour Law, Supplies The Applicable Federal Law On The OCS 18
A. OCSLA Makes Clear That All Law on the OCS is Federal Law and State Law is Limited to a Gap-Filling Role 18
B. California Wage-And-Hour Law is Inapplicable on the OCS Because the FLSA Provides the Applicable Federal Wage-And-Hour Rules 29
C. California Wage-And-Hour Law Does Not Extend to the OCS Because It is Inconsistent With the FLSA 38

D. Applying California Wage-and-Hour Law on the OCS Makes No Sense and Produces Results Congress Never Intended 45

CONCLUSION 51

STATUTORY APPENDIX

43 U.S.C. § 1332(1) 1a

43 U.S.C. § 1333(a) 1a

TABLE OF AUTHORITIES

Cases

Allison v. Boeing Laser Tech. Servs.,
689 F.3d 1234 (10th Cir. 2012) 21, 45

Amber Res. Co. v. United States,
538 F.3d 1358 (Fed. Cir. 2008) 4

Bailey v. United States,
516 U.S. 137 (1995) 34

Barrentine
v. Arkansas-Best Freight Sys., Inc.,
450 U.S. 728 (1981) 7, 8, 30

Brigham v. Eugene Water & Elec. Bd.,
357 F.3d 931 (9th Cir. 2004) 9

Brock v. Cincinnati,
236 F.3d 793 (6th Cir. 2001) 9

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 26, 27

Chi., Rock Island & Pac. Ry. Co. v. McGlinn,
114 U.S. 542 (1885) 20, 34, 35

Christopher v. SmithKline Beecham,
567 U.S. 142 (2012) 50

Cont'l Oil Co.
v. London S.S. Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) ..... *passim*

Cosme Nieves v. Deshler,
786 F.2d 455 (1st Cir. 1986) 43

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 47, 50

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 29

Garcia v. Freeport-McMoRan Oil & Gas LLC,
No. 16-cv-4320
(C.D. Cal. filed June 16, 2016) 12

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013) 32

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 21

Gregory v. Ashcroft,
501 U.S. 452 (1991) 44

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 7, 27

Indus. Welfare Comm'n v. Superior Court,
613 P.2d 579 (Cal. 1980) 10

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 45

Integrity Staffing Sols. v. Busk,
135 S. Ct. 513 (2014) 50

James Stewart & Co. v. Sadrakula,
309 U.S. 94 (1940) 35

Jefferson v. Beta Operating Co.,
No. 15-cv-4966 (C.D. Cal. filed July 1, 2015) 12

Judulang v. Holder,
565 U.S. 42 (2011) 47

Kendig v. ExxonMobil Oil Corp.,
No. 18-cv-9224
(C.D. Cal. filed Oct. 26, 2018) 12

Koren v. Martin Marietta Servs., Inc.,
997 F. Supp. 196 (D.P.R. 1998) 7

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 28

Lewis v. United States,
523 U.S. 155 (1998) 46

Loughrin v. United States,
573 U.S. 351 (2014) 38

McQuiggin v. Perkins,
569 U.S. 383 (2013) 34

Mendiola v. CPS Sec. Sols., Inc.,
340 P.3d 355 (Cal. 2015) ..... *passim*

Moody v. Callon Petroleum Operating Co.,
37 F. Supp. 2d 805 (E.D. La. 1999) 28

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 28

Paul v. United States,
371 U.S. 245 (1963) 21

Powell v. U.S. Cartridge Co.,
339 U.S. 497 (1950) 7, 30

Pure Oil Co. v. Snipes,
293 F.2d 60 (5th Cir. 1961) 44

Ransom v. FIA Card Services,
562 U.S. 61 (2011) 35, 36, 38

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352 (1969) ..... *passim*

Rousseau v. Teledyne Movible Offshore, Inc.,
805 F.2d 1245 (5th Cir. 1986) 9

Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 5, 43

Skidmore v. Swift & Co.,
323 U.S. 134 (1944) 8

Sturgeon v. Frost,
136 S. Ct. 1061 (2016) 33

Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 8

United States v. California, 332 U.S. 19 (1947) 4

United States v. Darby, 312 U.S. 100 (1941) 7, 30

United States v. Louisiana, 339 U.S. 699 (1950) 5

United States v. Maine, 420 U.S. 515 (1975) 46

United States v. Sharpnack, 355 U.S. 286 (1958) 29

United States v. Texas, 339 U.S. 707 (1950) 5

Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001) 44

Williams v. Brinderson Constructors, Inc., 2015 WL 4747892 (C.D. Cal. Aug. 11, 2015) 28

Williams v. Brinderson Constructors, Inc., No. 15-2474 (C.D. Cal. filed Apr. 3, 2015) 12

Constitutional Provision

U.S. Const. art. I, §8, cl.17 21

Statutes

10 U.S.C. §2671(a) 21

11 U.S.C. §707(b)(2)(A)(ii)(I) 35

26 U.S.C. §3305(d) 21

28 U.S.C. §5001(a) 21

29 U.S.C. §207(a) 8

29 U.S.C. §211(c) 32
29 U.S.C. §216(b) 32
29 U.S.C. §218(a) 13, 17, 42
40 U.S.C. §3172(a) 21
42 U.S.C. §7418(a) 21
43 U.S.C. §§1301-15 (1953) 4
43 U.S.C. §1331(a) 3
43 U.S.C. §1333(a)(1) ..... *passim*
43 U.S.C. §1333(a)(2)(A) ..... *passim*
43 U.S.C. §1333(a)(3) ..... *passim*
Pub. L. 93-627, 88 Stat. 2146 (1975) 29
Pub. L. 95-372, 92 Stat. 635 (1978) 29
Outer Continental Shelf Lands Act, 67 Stat. 462 (1953) 29

Regulations

29 C.F.R. §785.19 32
29 C.F.R. §785.22 48
29 C.F.R. §785.23 ..... 8, 31

Other Authorities

Ernest R. Bartley, *The Tidelands Oil Controversy* (1953) 4
Outer Continental Shelf, Bureau Of Ocean Energy Mgmt., https://perma.cc/65BW-LCM9 ..... 3, 4
Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23 (1953) 5, 23
99 Cong. Rec. 6963 (1953) 25

99 Cong. Rec. 7164 (1953) 25

Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: "Not Here, Not Now,"* CNBC (Sept. 8, 2018), https://perma.cc/6DDJ-6JFV 49

Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017) 48

Gavin Newsom (@GavinNewsom), Twitter (Feb. 7, 2018), https://perma.cc/WWJ9-962T 49

Outer Continental Shelf, Hearings Before the Comm. on Interior and Insular Affairs, 83d Cong. (1953) 23

Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945) 5

S. Rep. No. 83-411 (1953) 24

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* (Jan. 2018), https://bit.ly/2lU8cCV 48

U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018), https://on.doi.gov/2NOwIBc 49

INTRODUCTION

In the Outer Continental Shelf Lands Act (OCSLA), Congress made clear that all law on the Outer Continental Shelf (OCS) is federal law and state law never applies of its own force. To that end, Congress "extended" federal laws to the OCS "to the same extent" that they apply on other federal enclaves. 43 U.S.C. §1333(a)(1). Congress recognized that the interstitial nature of federal law would mean that some questions would arise on the OCS as to which there was no applicable federal law. To fill the gaps in the coverage of federal law, Congress provided that state law could be consulted, but only "[t]o the extent that [state laws] are applicable and not inconsistent" with federal law. *Id.* §1333(a)(2)(A). And even then, state law did not apply of its own force, but was "declared" to be federal law to be administered only by federal officials. *Id.* Congress underscored that looking to state law to supply the rule of decision for federal law would "never" give rise to any claim to state jurisdiction or sovereignty over the OCS. *Id.* §1333(a)(3). Thus, it is clear beyond cavil that Congress did not provide for the occasional borrowing of state laws out of respect for state sovereignty—indeed, states have never had any sovereignty over the OCS, and OCSLA was designed to extinguish any such claim—but solely out of necessity.

There is no dispute here that the Fair Labor Standards Act (FLSA) is among the federal laws extended to the OCS by OCSLA. Nor is there any question that the FLSA comprehensively addresses wage-and-hour questions and generally does not require employers who operate drilling platforms on

the OCS to provide compensation for every hour employees spend on the platform, such as time spent sleeping. California has adopted a different rule, which is its sovereign prerogative when it comes to wage-and-hour conditions within the Golden State, but not on the OCS. Nonetheless, respondent Brian Newton sought to export that California rule to the OCS and obtain damages for uncompensated sleep time. The Ninth Circuit validated that strategy, finding California wage-and-hour law applicable to the OCS (because it pertains to the dispute) and not inconsistent with federal law (because the FLSA has a saving clause for inconsistent state law). That decision was deeply flawed.

California wage-and-hour law does not govern on the OCS. The FLSA applies on the OCS and, in the absence of a gap in federal law, California wage-and-hour law is not "applicable" to the OCS. Nor is California wage-and-hour law "consistent" with the FLSA. The FLSA prescribes a federal minimum wage of $7.25 and treats sleep time as non-compensable; California's minimum wage is $12 and sleep time must be compensated. The rules are "inconsistent" and applying them both as *federal* law on the OCS makes no sense. One set of comprehensive federal wage-and-hour rules for the OCS is enough. The Ninth Circuit's contrary view ignores Congress' basic judgments in enacting OCSLA. Congress made clear that all law on the OCS would be federal law, and state law would be borrowed only when necessary. Borrowing California wage-and-hour law when federal law already provides different answers to the same questions is nonsensical and contrary to the entire thrust of OCSLA.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 881 F.3d 1078 and reproduced at Pet.App.1-41. The district court's order granting judgment on the pleadings is available at 2015 WL 12645746 and reproduced at Pet.App.46-60.

JURISDICTION

The Ninth Circuit issued its opinion on February 5, 2018, which it amended on April 27, 2018. The petition for writ of certiorari was filed on September 24, 2018, and was granted on January 11, 2019. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of OCSLA are set forth in the appendix to this brief.

STATEMENT OF THE CASE

A. The Outer Continental Shelf And OCSLA

The OCS consists of all submerged coastal lands that are within the United States' jurisdiction but outside the territorial jurisdiction of the individual states. *See* 43 U.S.C. §1331(a). The territorial jurisdiction of the states over submerged lands typically extends three nautical miles from the coast. *See Outer Continental Shelf*, Bureau Of Ocean Energy Mgmt., https://perma.cc/65BW-LCM9.[1] All submerged lands seaward from there and within the United States' jurisdiction under international law (ordinarily, submerged lands within 200 nautical

[1] The only exceptions are Texas and the west coast of Florida, where state jurisdiction extends three marine leagues instead of three nautical miles.

miles of the shore) constitute the OCS and fall under exclusive federal jurisdiction. *Id.*; *see Amber Res. Co. v. United States*, 538 F.3d 1358, 1362 (Fed. Cir. 2008).

This differential treatment of submerged lands is rooted in international law and in domestic history that culminated in the enactment of OCSLA. Early writers on international law posited that a nation's dominion extended as far into the sea as projectiles could be fired from its shore, a distance generally set at three miles. Ernest R. Bartley, *The Tidelands Oil Controversy* 9 (1953). This rule became customary international law in the nineteenth century, and in this country precipitated a dispute about which sovereign possessed rights to the minerals beneath submerged lands in the three-mile belt: the federal government or the coastal states. *See United States v. California*, 332 U.S. 19, 31-34 (1947). This Court resolved the dispute in favor of the federal government. *Id.* at 38-39. Not long afterward, however, Congress, recognizing that states had long exercised *de facto* control over the three-mile belt, passed the Submerged Lands Act, which ceded to the states the federal interest in submerged lands within the three-mile belt. 43 U.S.C. §§1301-15 (1953).

While the dispute over the three-mile belt was ongoing, President Truman proclaimed the United States' exclusive control over natural resources in submerged lands seaward of the three-mile belt, *i.e.*, the OCS. He declared that the "United States regards the natural resources of the subsoil and sea bed of the Continental Shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its

jurisdiction and control." Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945). The continental shelf beyond the three-mile belt had never seriously been thought of as within state control. *See United States v. Texas*, 339 U.S. 707, 719-20 (1950) (rejecting Texas' claim to a 27-mile belt); *United States v. Louisiana*, 339 U.S. 699, 705-06 (1950) (same as to Louisiana). As a result, the federal government's exclusive jurisdiction over the OCS, unlike its claim to exclusive jurisdiction over the three-mile belt (which was ceded in the Submerged Lands Act), was "never hotly controversial." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 24 (1953).

In 1953, Congress enacted OCSLA, which "emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 27 (1988). OCSLA's primary purpose was to make clear that the OCS was an exclusively federal enclave on which all law was federal law and to "define a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms] on the [OCS]." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). Congress initially considered treating drilling platforms like vessels and applying federal maritime law, but ultimately concluded "that maritime law was inapposite to these fixed structures." *Id.* at 363. Congress also considered and emphatically rejected the direct application of the law of the adjacent state, deciding against "the notion of supremacy of state law administered by state agencies." *Cont'l Oil Co. v.*

London S.S. Owners' Mut. Ins. Ass'n, 417 F.2d 1030, 1036 (5th Cir. 1969).

Congress instead declared that the OCS would be governed exclusively by federal law. Specifically, Congress provided: "The Constitution and laws and civil and political jurisdiction of the United States are extended to the [OCS] ... to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1). Put succinctly, the OCS is entirely within federal "civil and political jurisdiction," and all law on the OCS is federal law. *See Rodrigue*, 395 U.S. at 357 ("[F]ederal law is 'exclusive' in its regulation of this area.").

At the same time, Congress recognized that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems" that could arise on drilling platforms. *Id.* Accordingly, to fill "gaps in the federal law," *id.*, Congress looked to the laws of the adjacent state as supplying the rule of decision for federal law, but only "[t]o the extent" those state laws "are applicable and not inconsistent with ... other Federal laws." 43 U.S.C. §1333(a)(2)(A). To ensure that this limited incorporation of state-law standards would not erode the exclusively federal character of the OCS or federal control over the OCS, Congress emphasized that any borrowing of state-law standards as federal law "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [OCS]." *Id.* §1333(a)(3). Relatedly, to preclude any possibility that state agencies or state officers would be responsible for administering state law on the OCS, Congress

specified that, even when state-law standards are borrowed and "declared" to be federal law, federal law "shall be administered and enforced by the appropriate officers and courts of the United States." *Id.* §1333(a)(2)(A). In short, OCSLA makes clear that no state law operates of its own force on the OCS, and is emphatic that states have no direct sovereignty over the OCS.

This Court has described the resulting scheme as follows: "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981).

B. The Fair Labor Standards Act

The FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that protects "all covered workers from substandard wages and oppressive working hours," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981); *see also Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950) (observing that "[b]readth of coverage" is "vital to [the FLSA's] mission."). The FLSA applies to all workers nationwide and is the exclusive source of wage-and-hour law on federal enclaves, like military bases. *See, e.g., Koren v. Martin Marietta Servs., Inc.*, 997 F. Supp. 196, 205 (D.P.R. 1998). "The FLSA was designed to give specific minimum protections to individual workers and to ensure that each employee covered by the Act would receive a fair day's pay for a fair day's work and would be protected from the evil of

overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (alterations omitted). To that end, the FLSA sets a federal minimum wage (currently $7.25) and, subject to a series of exemptions, requires employers to pay employees for all time worked, including overtime wages equal to one-and-a-half times the employee's regular rate for all work performed in excess of 40 hours per week. 29 U.S.C. §207(a).

Congress delegated the enforcement and administration of the FLSA to the Labor Department and its Wage and Hour Division. The Department's implementing regulations address how to calculate the number of hours worked in various factual circumstances, including how to determine whether employees must be compensated for time spent on the employer's premises but off-duty, such as time spent sleeping. Federal regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. §785.23. While there is no "legal formula to resolve cases so varied in their facts as are the many situations in which employment involves" off-duty time spent on an employer's premises, *Skidmore v. Swift & Co.*, 323 U.S. 134, 136 (1944), federal regulations direct courts to accept "any reasonable agreement of the parties which takes into consideration all of the pertinent facts," 29 C.F.R. §785.23; *see Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 603 (1944) ("[The FLSA] does not foreclose, of course, reasonable provisions of contract or custom governing the computation of work hours where precisely accurate computation is difficult or impossible.").

Courts have developed a substantial body of case law applying the FLSA and its regulations in this context. For example, in the Ninth Circuit, "the two predominant factors in determining whether an employee's on-call waiting time is compensable overtime are (1) the degree to which the employee is free to engage in personal activities; and (2) the agreements between the parties." *Brigham v. Eugene Water & Elec. Bd.*, 357 F.3d 931, 936 (9th Cir. 2004); *see also, e.g.*, *Brock v. Cincinnati*, 236 F.3d 793, 806 (6th Cir. 2001) (noting that an agreement is reasonable if it "falls within a broad zone of reasonableness, considering its terms and all of the facts and circumstances of the parties' relationship"); *Rousseau v. Teledyne Movible Offshore, Inc.*, 805 F.2d 1245, 1247 (5th Cir. 1986) (holding off-duty hours non-compensable for employees residing on employer's barges). Consistent with these principles, employers and employees on the OCS have long entered into agreements that do not treat every hour spent on the OCS as a compensable hour of work, and those agreements have long been understood to be fully consistent with the FLSA.

C. Factual and Procedural Background

Respondent Brian Newton worked from January 2013 to January 2015 on Petitioner Parker Drilling's platforms, which are attached to the OCS off the California coast. Pet.App.2. As is standard for employees on drilling platforms, Newton worked fourteen-day shifts on the platform. Pet.App.3. During each shift, he remained on the platform at all times, spending 12 hours on-duty and 12 hours off-duty. Pet.App.3. Other crew members maintained the

opposite schedule, allowing the rig to operate 24 hours a day. Pet.App.3. Parker compensated Newton for the 12 hours he spent on-duty each day, but not for the 12 hours he was off-duty each day. J.A.17. Thus, in a typical seven-day work week, Newton was paid for 84 hours of work, 40 hours paid at his base wage and 44 hours of overtime. After Newton completed a 14-day shift, he would spend 14 days onshore, and two additional crews would work in 12-hour shifts, so that in a 28-day cycle, four different workers would perform the same role, and the platform would remain fully engaged around the clock. Like most employees on drilling rigs, Newton earned "well above the state and federal minimum wage," including, in light of his twelve-hour workdays, "premium rates for overtime hours." Pet.App.20.

In January 2015, the California Supreme Court interpreted a state administrative wage order and held that California wage-and-hour law, unlike the FLSA, requires employers to compensate workers "for all on-call hours spent at their assigned worksites under their employer's control," including sleep time. *Mendiola v. CPS Sec. Sols., Inc.*, 340 P.3d 355, 357 (Cal. 2015).[2] In so holding, the court underscored that

---

[2] Wage-and-hour issues in California are governed primarily by 18 industry-specific or occupation-specific Wage Orders issued by the now-defunct Industrial Welfare Commission and enforced by the state Division of Labor Standards Enforcement. *See Indus. Welfare Comm'n v. Superior Court*, 613 P.2d 579 (Cal. 1980). All employees working on-site in the drilling industry within California are covered by Wage Order 16, *see* 8 Cal. Code Reg. §11160, which was issued in 2001 and contains the same operative language as the Wage Order at issue in *Mendiola* (Wage Order 4).

the California agency charged with enforcing state wage-and-hour law had expressly departed from the FLSA, and the court expressly rejected the employer's reliance on 29 C.F.R. §785.23. *Id.* at 361 ("[W]e decline to import any federal standard."). The California Supreme Court further held that pursuant to the order, and again contrary to the FLSA, employers and employees *cannot* agree to exclude sleep time from hours worked for compensation purposes. *Id.* at 363. On this point, the court likewise expressly declined to follow federal law. *Id.* at 365. This is far from the only point on which California wage-and-hour law differs from the FLSA. To pick just the most obvious example, California prescribes a state minimum wage of $12, while the FLSA prescribes a federal minimum wage of $7.25.

Barely one month after *Mendiola*, Newton filed a class action complaint in California state court, alleging that California wage-and-hour law required Parker to pay him and similarly situated workers not only for the 12 hours they worked each day on the platform, but also for the 12 hours they spent off-duty, including time spent sleeping. Pet.App.3. The complaint asserts seven causes of action alleging various forms of underpayment, each of which is premised on the same theory made possible by *Mendiola*—*i.e.*, that California law, unlike the FLSA, required Parker to include all 24 hours each day in calculating hours worked. *See* J.A.18-31. On behalf of himself and others, Newton sought backpay for the pre-*Mendiola* periods in which Parker did not include off-duty time and sleep time as part of hours worked. Newton did not allege that Parker violated the FLSA.

Other plaintiffs, often represented by the same counsel, filed substantively identical class actions against other companies operating on the OCS. *See, e.g.*, *Kendig v. ExxonMobil Oil Corp.*, No. 18-cv-9224 (C.D. Cal. filed Oct. 26, 2018); *Garcia v. Freeport-McMoRan Oil & Gas LLC*, No. 16-cv-4320 (C.D. Cal. filed June 16, 2016); *Jefferson v. Beta Operating Co.*, No. 15-cv-4966 (C.D. Cal. filed July 1, 2015); *Williams v. Brinderson Constructors, Inc.*, No. 15-2474 (C.D. Cal. filed Apr. 3, 2015).

Parker removed the action to federal court and moved for judgment on the pleadings, arguing that California wage-and-hour law does not extend to the OCS either directly or indirectly by providing the content of federal law on the OCS. Pet.App.4. The district court granted Parker's motion. Relying on the Fifth Circuit's *Continental Oil* line of cases—which, in turn, relies on a series of decisions from this Court—the district court explained that "under OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." Pet.App.51 (quoting *Cont'l Oil*, 417 F.2d at 1036). Because the FLSA is a comprehensive federal wage-and-hour scheme, the court observed, "there are no significant voids or gaps" in federal law, and therefore "it is not necessary to apply the law of the adjacent state." Pet.App.52.

The Ninth Circuit, in a decision by Judge Christen and joined by Judges Paez and Berzon, reversed. Expressly rejecting *Continental Oil*, the court held that "the absence of federal law is not ... a prerequisite to adopting state law as surrogate federal law under [OCSLA]." Pet.App.2. The court acknowledged that

the Fifth Circuit interpreted OCSLA and this Court's cases as "requir[ing] that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Cont'l Oil*, 417 F.2d at 1036. The court likewise acknowledged that every district court in the Ninth Circuit to consider the issue had followed the Fifth Circuit's lead and "concluded that California's wage and hour laws do not extend to OCS platform workers because the FLSA leaves no gap for state law to fill." Pet.App.20 n.13. The court nonetheless disagreed with that previously unanimous interpretation: "We ... reject the proposition that 'necessity to fill a significant void or gap' is required in order to assimilate 'applicable and not inconsistent' state law into federal law." Pet.App.2 (citations omitted). Instead, the court held, state laws are "applicable" under OCSLA whenever they "pertain[] to the subject matter at hand." Pet.App.21.

The court likewise held that, despite the fundamentally different treatment of sleep time and off-duty time in California and federal law, California wage-and-hour law was nonetheless "not inconsistent with" the FLSA for purposes of OCSLA. 43 U.S.C. §1333(a)(2)(A). The court held that California law is "not inconsistent with" the FLSA because the FLSA's saving clause "explicitly permits more protective state wage and hour laws." Pet.App.36; *see* 29 U.S.C. §218(a). Having concluded that "California's minimum wage and maximum hours worked provisions are applicable and not inconsistent with the FLSA," the court vacated the district court's judgment and remanded for further proceedings. Pet.App.39 (citation omitted). The court denied a petition for *en banc* review, but the panel amended its opinion to

direct the district court to consider whether its holding "should be applied retrospectively." Pet.App.43.

SUMMARY OF ARGUMENT

California wage-and-hour law does not apply directly or indirectly on the OCS. It is clear beyond cavil that California wage-and-hour law does not apply directly to the OCS. Congress considered and rejected the possibility of state law applying to the OCS of its own force, and instead made clear that all law on the OCS is federal law. And it is equally clear that California wage-and-hour law does not apply to the OCS indirectly by supplying the content for a second federal wage-and-hour law to supplement the FLSA on the OCS. There is no question that the FLSA extends to the OCS, and nothing in OCSLA creates the anomaly of two federal wage-and-hour laws, one emanating from Washington and prescribing a $7.25 minimum wage and the other emanating from Sacramento and prescribing a $12 minimum wage and a fundamentally different rule for off-duty hours. Instead, under OCSLA, the one and only federal wage-and-hour law governing the OCS is the FLSA.

That result follows from the plain text of OCSLA. The relevant subsections of 43 U.S.C. §1333(a) work together to make clear that the FLSA provides the only applicable wage-and-hour law on the OCS. First, §1333(a)(1) provides that federal law "extend[s]" to the OCS "to the same extent" as it extends to other exclusively federal enclaves. Second, §1333(a)(2)(A) provides that state law is "declared" to be federal law, to the extent it is "applicable and not inconsistent with" federal law. That subsection further provides that even when state law supplies the rule for federal

law on the OCS, that law "shall be administered and enforced by the appropriate officers and courts of the United States." Finally, §1333(a)(3) underscores that the provisions for "the adoption of state law" as federal law "shall never be interpreted" as giving states any claim to jurisdiction over the OCS. Together, these provisions make clear that all law on the OCS is federal law and that Congress authorized the relatively extraordinary step of converting state law into federal law to be administered by federal officials only when there is a gap in applicable federal law that needs to be filled. OCSLA does not envision state law supplying the content of federal law as a matter of course whenever state law pertains to the question at hand, nor does it permit the application of two different federal wage-and-hour laws prescribing inconsistent minimum-wage and sleep-time rules.

California wage-and-hour law is neither applicable to the OCS nor consistent with the FLSA. First, California wage-and-hour law is not applicable to the OCS in the absence of a gap in federal law that needs to be filled by borrowing a state-law rule of decision as surrogate federal law. The Ninth Circuit's contrary view that all state law is applicable to the OCS whenever it pertains to the subject matter at hand ignores the primary decision of Congress in enacting OCSLA and the text of §1333(a)(1). The most fundamental decision Congress made in OCSLA was to establish that all law on the OCS is federal law. Congress implemented that judgment in §1333(a)(1), which extends federal law to the OCS "to the same extent as if the [OCS] were an area of exclusive federal jurisdiction located within a state." At the time of OCSLA's enactment, it was already well established

that state law does not presumptively apply to exclusive federal enclaves within a state in the absence of a gap in federal law; if federal law already addresses the subject, state law is inapplicable to the federal enclave. That rule applies *a fortiori* to the OCS, which unlike most federal enclaves lies completely outside state jurisdiction and can borrow a state rule only through the extraordinary process of declaring state law to be federal law to be administered by federal officials. When §1333(a)(2)(A) is read in light of §1333(a)(1) and Congress' primary judgment in making federal law the exclusive law of the OCS, it is clear that state law is not applicable to the OCS in the absence of a gap in federal law. That result is confirmed by context, legislative history, and an unbroken line of this Court's cases.

Second, California wage-and-hour law does not apply to the OCS because it is inconsistent with the FLSA. The Ninth Circuit acknowledged that California wage-and-hour law does not apply of its own force, but merely supplies the content for federal law. But that would create a glaring inconsistency between the two federal wage-and-hour laws, one of which prescribes a federal minimum wage of $7.25 and the other that would prescribe an equally-federal minimum wage of $12 by borrowing a minimum wage from California. There would be an equally glaring inconsistency between the FLSA rule that does not treat every hour on an employer's premises as compensable, and a federal rule borrowed from California that treats every hour as compensable. These inconsistencies are undeniable because they are intentional: As the California Supreme Court acknowledged in *Mendiola*, in fashioning rules for

California, state regulators explicitly rejected the FLSA's approach to off-duty time.

The Ninth Circuit ignored those stark inconsistencies by invoking the FLSA's saving clause, which provides that when state and federal wage-and-hour law conflict, the FLSA will not excuse compliance with the more protective state law. *See* 29 U.S.C. §218(a). But the FLSA's saving clause does not mean that state law and the FLSA are "consistent." To the contrary, the necessary precondition for triggering the saving clause is an inconsistency between state and federal law. What is more, the FLSA saves more protective state law out of respect for state sovereignty and the state's traditional role as the primary regulator of workplace conditions within those states' jurisdictions. Those principles have no application on the OCS, an exclusive federal enclave, wholly beyond state jurisdiction, where all law is federal law. While it makes sense in our federalist system for federal law to yield to California's more protective judgment in Fresno, it makes no sense for the federal rules prescribed by Congress and the Labor Department to yield on the OCS to contrary judgments made in Sacramento. Nothing in the saving clause supports that latter result.

Finally, borrowing duplicative federal wage-and-hour rules from California would produce a host of negative consequences, all of which would frustrate Congress' underlying purposes in enacting OCSLA. The Ninth Circuit approach mandates a completely different wage-and-hour regime for OCS platforms off the California shore from those in the Gulf. There is no reason that Congress would have wanted such

needless disparity on the OCS in the absence of a gap in federal law. Similarly, Congress was sufficiently alarmed by the prospect of state officials administering state law on the OCS that it specified that even when state law is borrowed for the OCS, federal officials remain responsible for administering that law. That unusual arrangement is understandable when there is no applicable federal law and the only alternative is state officials administering state law on the OCS. But foisting the extraordinary responsibility of administering California wage-and-hour law on federal wage-and-hour officials already charged with administering on-point federal law (and who have already reached a contrary judgment about off-duty time) makes no sense. Finally, the Ninth Circuit's decision opens up the prospect that states with a different and dimmer view of OCS operations than the federal government may inflict burdensome policies on OCS operators. Congress precluded that result by envisioning only a limited gap-filling role for state law on the OCS. This Court should restore Congress' vision and reverse the Ninth Circuit.

ARGUMENT

I. The FLSA, Not California Wage-And-Hour Law, Supplies The Applicable Federal Law On The OCS.

A. OCSLA Makes Clear That All Law on the OCS is Federal Law and State Law is Limited to a Gap-Filling Role.

Congress enacted OCSLA to provide a comprehensive body of law for disputes arising on the OCS. Congress considered and rejected the possibility

of applying state law directly to the OCS or treating OCS platforms as vessels subject to admiralty and maritime law. Instead, Congress embraced a regime where all law on the OCS is federal law. Under OCSLA, if federal law addresses the subject matter of a dispute, that federal law governs exclusively. There is no role for dual sovereigns on the OCS, as the whole point of OCSLA was to establish the OCS as an exclusively federal enclave and to emphatically reject any claim to state jurisdiction more than three miles seaward from the coast.

At the same time, because of the interstitial nature of federal law, Congress understood that there would be some circumstances in which there would be no on-point federal law, as in a garden-variety contract or tort case. In those cases, Congress provided that the law of the adjacent state could be adopted, but not as state law. Instead, state law would be declared federal law (to be administered by federal officials) and supply the content for federal law. The upshot of this arrangement is that *all* law on the OCS is federal law, and state law supplies the rule of decision for federal law only when there is a gap in federal law. The Ninth Circuit's alternative rule, under which state law is applicable to the OCS whenever it pertains to the subject matter at hand, is incompatible with Congress' fundamental judgment in enacting OCSLA as well as OCSLA's text, legislative history, and a host of this Court's precedents.

1. The most basic judgment Congress made in enacting OCSLA was to establish federal law as the exclusive law that governed on the OCS. Congress expressly rejected the notion that state law would

govern the OCS and was particularly alarmed at the prospect that state officials could administer the law applicable on the OCS. Multiple provisions of OCSLA underscore Congress' basic judgment that all law on the OCS is federal law, and state law never applies of its own force.

Section 1333(a)(1) makes Congress' preference for federal law unmistakable. That provision states that "[t]he Constitution and laws and civil and political jurisdiction of the United States are extended to the [OCS] ... to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1). Importantly, this provision not only extends federal law to the OCS, but does so "to the same extent" as if the OCS were an exclusive federal enclave. As this Court explained 50 years ago in *Rodrigue*, this sweeping provision "makes it clear that federal law ... is to be applied to these artificial islands as though they were federal enclaves in an upland State." 395 U.S. at 355.

Section 1333(a)(1)'s reference to federal enclaves itself makes clear that state law is not presumptively applicable whenever it pertains to an issue that could arise on the OCS, but rather is limited to a gap-filling role. Even in the context of a federal enclave located entirely within the boundaries of a sovereign state, state law is not presumptively applicable within the federal enclave. Rather, in such enclaves, the presumption is that federal law is exclusive, and state law applies only if there is a gap in federal law. *See Chi., Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546-47 (1885). Congress' assertion of exclusive

legislative power over a federal enclave "bars state regulation without specific congressional action." *Paul v. United States*, 371 U.S. 245, 263 (1963); *see* U.S. Const. art. I, §8, cl.17.[3] That principle applies *a fortiori* to the OCS, which is an exclusive federal enclave wholly outside the sovereign territory of an adjacent state. Indeed, the only exception to the need for "Congress [to] provid[e] 'clear and unambiguous' authorization for [state] regulation" of federal enclaves within states is for local laws that predated the establishment of the federal enclave. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988); *see also Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1238 (10th Cir. 2012). But on the OCS, no state exercised sovereignty pre-OCSLA.

Congress reinforced its decision to make all law on the OCS federal and to limit state law to a gap-filling role in §1333(a)(2)(A). That subsection provides that "to the extent that they are applicable and not inconsistent with" federal law, the laws of each adjacent state "are declared to be the law of the United States." 43 U.S.C. §1333(a)(2)(A). Unlike §1333(a)(1), which "extend[s]" federal law to the OCS, §1333(a)(2)(A) does not "extend" state law to the OCS or otherwise make it directly applicable to the OCS.

---

[3] As an example of the requisite clear and unambiguous authorization for the application of state law to federal enclaves, Congress has provided: "In the case of the death of an individual by the neglect or wrongful act of another in a place subject to the exclusive jurisdiction of the United States within a State, a right of action shall exist as though the place were under the jurisdiction of the State in which the place is located." 28 U.S.C. §5001(a); *see also* 40 U.S.C. §3172(a); 26 U.S.C. §3305(d); 10 U.S.C. §2671(a); 42 U.S.C. §7418(a).

Instead, §1333(a)(2)(A) takes the content of state law and "declare[s]" it to be "the law of the United States," which is to say, federal law. And §1333(a)(2)(A) converts state laws into federal law in that unusual fashion only "to the extent they are applicable and not inconsistent with" federal law. Then, §1333(a)(2)(A) underscores the limited role of state law—and Congress' extreme aversion to the prospect of the OCS being regulated by state officials—by providing: "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." Finally, to remove all doubt concerning the exclusivity of federal law on the OCS, §1333(a)(3) provides that "[t]he provisions of this section providing for adoption of state law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over" the OCS. A clearer disclaimer of any direct sovereign interest of the states with respect to the OCS would be hard to imagine.

The reinforcing provisions of §1333(a) make at least two things plain. First, all law on the OCS is federal law. There is absolutely no role for dual-sovereignty principles or for state law applying of its own force. Second, the role of state law is limited to a gap-filling role, and even then its only role is to provide a rule of decision for federal law, not to replace already existing federal law. This second proposition is reflected in §1333(a)(1)'s extension of federal law to the OCS "to the same extent" as on an exclusive federal enclave, and in §1333(a)(2)(A)'s limited incorporation of state law as federal law "to the extent applicable and not inconsistent with" federal law. To

be sure, it might be possible to read the word "applicable" in isolation to provide for the extension of state law to the OCS whenever state law is written in broad enough terms that it could be said to pertain to the subject matter at hand. But such a reading is plainly incompatible with Congress' basic decision to treat the OCS as an exclusive federal enclave where all law is federal law and state law is inapplicable in the absence of a gap in federal law, as well as with the broader context of §1333(a), including §1333(a)(1) and §1333(a)(3). Read together and against the backdrop of Congress' primary decision to make federal, and not state, law presumptively applicable on the OCS, those provisions make clear that state law is only "applicable" to the OCS when there is a gap that needs to be filled in the federal law directly "extended" to the OCS by §1333(a)(1).

2. The limited gap-filling role of state law on the OCS is confirmed by OCSLA's legislative history. The initial Senate version of OCSLA would have treated drilling platforms as if they were vessels, and thus filled the gaps in federal law with maritime law. *See* Christopher, *supra*, at 40. But in legislative hearings on OCSLA, Senator Daniel and others repeatedly urged "the application of State laws in the fields where we do not have specific federal laws," *Outer Continental Shelf, Hearings Before the Comm. on Interior and Insular Affairs*, 83d Cong. 45, 645 (1953). In response, the Senate Committee replaced its maritime-law proposal with the language that now appears in §1333(a). *See* Christopher, *supra*, at 40-41 & n.93.

The accompanying Senate Report explains the limited role state law would play "in the absence" of applicable federal law. In particular, the Senate Report states:

> To carry out the primary purposes of the measure, a body of law is extended to the outer shelf area, consisting of:
>
> (a) The constitution and the laws, and the civil and political jurisdiction, of the Federal Government;
>
> (b) the regulations, rules, and operating orders of the Secretary of the Interior; and
>
> (c) *in the absence of such applicable Federal law or adequate Secretarial regulation*, the civil and criminal laws of the State adjacent to the outer shelf area. Such State laws are adopted as Federal law....

S. Rep. No. 83-411, at 2 (1953) (emphasis added). A section of the Senate Report explaining the Committee's amendments describes §1333(a)(2)(A) the same way: "Paragraph (2) adopts State law as Federal law, *to be used when Federal statutes or regulations of the Secretary of the Interior are inapplicable*." *Id.* at 23 (emphasis added). As this Court noted in *Rodrigue*, "this language makes it clear that state law could be used to fill federal voids." 395 U.S. at 358.

The Senate-House conferees accepted the Senate's version of the bill, with just one modification not relevant here. *See* Christopher, *supra*, at 31. Senator Cordon, the acting chair of the Senate Interior and Insular Affairs Committee, introduced the

conference bill on the Senate floor. He explained that the Committee had considered "the extension of State laws and with them State boundaries to the outer edge of the shelf," but rejected that approach because the OCS "is not and never has been within the boundary of any State or Territory, and it is, therefore, uniquely an area of exclusive Federal jurisdiction and control." 99 Cong. Rec. 6963 (1953). The Committee decided instead to apply to the OCS "the whole body of Federal law which applies today to those areas inside the States owned by the Federal Government under exclusive Federal jurisdiction." *Id.* But because "the Federal Code was never designed to be a complete body of law in and of itself," the bill proposed, as a "housekeeping law," the "enactment as Federal law by reference of the laws of the several abutting States." *Id.* As Senator Anderson, a member of the conference committee, put it: "The real point is ... that the language in section 4 provides that Federal laws and regulations shall be applicable in the area, but that where there is a void, the State law may be applicable." 99 Cong. Rec. 7164 (1953).

3. This Court's cases have likewise repeatedly recognized the limited role of state law, which is applicable to the OCS only as a gap-filler when federal law is inapplicable. This Court first confronted §1333(a) in *Rodrigue*, a dispute about whether the federal Death On The High Seas Act (DOHSA) or Louisiana state law (declared to be federal law under OCSLA) should apply to wrongful-death actions filed by survivors of workers who died on the OCS. 395 U.S. at 352-53. In answering that question, this Court extensively traced OCSLA's history, recounting that Congress had rejected both the wholesale application

of maritime law and the wholesale application of state law, electing instead to make federal law exclusive. *Id.* at 355-58. In describing state law's limited role, this Court repeatedly emphasized that state law applied only "to fill federal voids." *Id.* at 358; *see id.* at 357 ("[T]he Act supplemented gaps in the federal law with state law."); *id.* at 362 ("[T]he whole body of Federal law was made applicable to the area as well as state law where necessary." (alterations omitted)).

The question in *Rodrigue* thus came down to whether DOHSA covered the subject matter of the dispute or whether it left a gap in federal law that made it necessary to borrow state law and convert it into federal law. In the end, the Court decided that the incidents did not occur on the "high seas" and thus fell outside DOHSA's scope. *Id.* at 359-60. It followed, therefore, that there was a "gap" in federal law that needed to be filled with adopted state law: "[T]he inapplicability of [DOHSA] removes any obstacle to the application of state law by incorporation as federal law through [OCSLA]." *Id.* at 366. The "recurring theme" of *Rodrigue*, as the Fifth Circuit later observed, is that state law does not apply on the OCS unless it is "necess[ary] to fill a significant void or gap" in federal law. *Cont'l Oil*, 417 F.2d at 1036.

Later OCSLA decisions have reaffirmed state law's limited gap-filling role on the OCS. For example, there was a gap in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), because federal law did not prescribe a statute of limitations for the suit at issue, and the question before the Court was how to fill it. The Court began its analysis by noting that, in *Rodrigue*, "we recognized that there exists a substantial 'gap' in

federal law. Thus, state law remedies are not 'inconsistent' with applicable federal law." *Id.* at 101. Although the court of appeals had filled that gap by creating federal common law, this Court held that OCSLA requires such gaps to be filled with borrowed state law: "Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law." *Id.* at 104-05.[4] Similarly, in *Gulf Offshore*, 453 U.S. 473, this Court emphasized that the role of state law under OCSLA is "to fill the substantial 'gaps' in the coverage of federal law." *Id.* at 480.

To be sure, this Court has not yet confronted a case where, as here, there is no gap in federal law. But courts in the Fifth Circuit have long employed this Court's precedents to find state law inapplicable when federal law applied, leaving no gap and no justification for converting state law into federal law to fill the gap.

For example, in *Continental Oil*, the Fifth Circuit affirmed the district court's dismissal of a lawsuit based on a Louisiana statute, stating that state law

---

[4] *Huson* underscores that when state law fills a gap in federal law, it fills the gap not by simply applying as state law but by being converted into *federal law*, and thus ceases to be state law. The difference was critical in *Huson* because under Louisiana law "prescriptive time limitations are not binding outside their own forum." 404 U.S. at 102. The Court of Appeals applied that Louisiana law principle to hold the Louisiana time limit inapplicable on the OCS. This Court rejected that reasoning, explaining that such state-law limits were inapplicable because Louisiana law was not being projected outside Louisiana contrary to state policy. Rather, Louisiana's time limit was being borrowed as federal law and being applied in a federal forum.

applies under OCSLA only when needed "to fill a significant void or gap" in federal law. 417 F.2d at 1036. The court, relying extensively on *Rodrigue*, held that because federal law already provided "substantive rights and remedies" for the plaintiffs' injuries, "[t]here is no void, there are no gaps" for state law to fill. *Id.* Accordingly, the Louisiana statute did not apply. *Id.* at 1040. The court expressly rejected the argument that "the term 'applicable'" means only that the relevant state law is "applicable to the subject matter in question." *Id.* at 1035. That interpretation, the court explained, "imputes to Congress the purpose generally to export the whole body of adjacent [state] law onto the" OCS. *Id.* Such a result "is hardly in keeping with" Congress' "reject[ion]" in OCSLA of "the notion of supremacy of state law administered by state agencies." *Id.* at 1036. The Fifth Circuit and other courts have continued to rely on *Rodrigue*, *Huson*, and *Gulf Offshore* in refusing to convert state law into federal law applicable to the OCS unless doing so is "necessary to fill some gap in federal law." *Nations v. Morris*, 483 F.2d 577, 589 (5th Cir. 1973); *see also LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985); *Moody v. Callon Petroleum Operating Co.*, 37 F. Supp. 2d 805, 809-12 (E.D. La. 1999); *Williams v. Brinderson Constructors, Inc.*, 2015 WL 4747892, at *4 (C.D. Cal. Aug. 11, 2015).

There is no justification for departing from this Court's longstanding view that state law plays only a gap-filling role and is inapplicable to the OCS when on-point federal law applies and leaves no gap. That is especially true given that Congress has since amended §§1333(a)(1) and (a)(2)(A)—including the specific sentences at issue here—without disturbing

this Court's interpretation. *See* Pub. L. 95-372, Tit. II, §203, 92 Stat. 635 (1978); Pub. L. 93-627, §19(f), 88 Stat. 2146 (1975); *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.").[5]

B. California Wage-And-Hour Law is Inapplicable on the OCS Because the FLSA Provides the Applicable Federal Wage-And-Hour Rules.

1. California wage-and-hour law is inapplicable on the OCS because OCSLA unambiguously extends to the OCS the FLSA and its federal wage-and-hour regulations administered by federal officials. *See* 43 U.S.C. §1333(a)(1). The applicability of the FLSA to the OCS ensures there is no gap in federal law and

---

[5] The inference that Congress was actually aware of and did not intend to disturb judicial decisions recognizing the inapplicability of state law in the absence of a gap in applicable federal law is particularly strong given that Congress amended §1333(a)(2)(A) in 1975 as an explicit response to a decision of this Court, namely, *United States v. Sharpnack*, 355 U.S. 286, 287 (1958), which held that the Assimilative Crimes Act did not create a non-delegation-doctrine problem by incorporating subsequently enacted state criminal laws on federal enclaves to fill gaps in federal criminal law. In response, Congress amended OCSLA, which initially limited §1333(a)(2)(A) to applicable and not inconsistent state law in existence as of OCSLA's effective date. *See* Outer Continental Shelf Lands Act, ch. 345, §4, 67 Stat. 462-63 (1953). OCSLA's original text underscores that Congress looked to pre-existing state law only as a potential gap-filler, and the amendment in light of *Sharpnack* reinforces that Congress viewed the OCS as an exclusive federal enclave where federal law is exclusive in the absence of a gap.

renders California wage-and-hour rules inapplicable for purposes of §1333(a)(2)(A). Even putting aside the glaring inconsistencies between the FLSA and California wage-and-hour law, *but see* pp.38-45, *infra*, there is no need to have two federal wage-and-hour regimes applicable to the OCS—and no need to take the rather extraordinary step of borrowing state law and declaring it to be federal law (to be administered exclusively by federal officials)—when Congress has already supplied applicable federal law (administered by those same federal officials). Put simply, when there is already applicable federal wage-and-hour law emanating from Washington, there is no need to look to Sacramento. In the absence of a gap in applicable federal law, state law is simply inapplicable to the OCS. As explained above, this result flows from the text, context, and legislative history of OCSLA.

There is no question here that the FLSA both is applicable to the OCS and comprehensively regulates wage-and-hour issues, including the issues here. It is beyond dispute that the FLSA is among the federal laws that OCSLA "extend[s]" to the OCS "to the same extent" as other federal enclaves. And this Court has already recognized that the FLSA is "a comprehensive legislative scheme," *Darby*, 312 U.S. at 109, the "[b]readth" of which is "vital to its mission," *Powell*, 339 U.S. at 516. The FLSA's expansive protections are "stated in terms of substantial universality," *id.*, shielding "all covered workers from substandard wages and oppressive working hours, labor conditions that are detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers," *Barrentine*, 450 U.S. at 739. The FLSA specifies the

federal minimum wage, the federal maximum workweek, requires the payment of overtime subject to numerous exemptions, and via Labor Department regulations, addresses a wide range of wage-and-hour issues. Because the FLSA comprehensively addresses wage-and-hour issues on the OCS, there is no "gap[] in the federal law" and thus no role for California wage-and-hour law. *Rodrigue*, 395 U.S. at 357.

Examining Newton's specific claims reinforces that there is no gap for California's wage-and-hour law to fill. At bottom, all of Newton's claims are premised on a single California wage-and-hour rule: that employees are entitled to compensation for all off-duty time spent on the employer's premises, including time spent sleeping. *See Mendiola*, 340 P.3d at 357. But federal law has its own set of rules for determining whether such hours must be compensated. *See* 29 C.F.R. §785.23; *see also* pp.7-9, *supra*. Indeed, when California regulators adopted their rules for off-duty time, they did not think they were filling a gap in the FLSA. To the contrary, they expressly and intentionally departed from the FLSA, as the California Supreme Court recognized in *Mendiola*. *See* 340 P.3d at 357-65. Thus, when an employee claims that he has not been compensated for all "hours worked," there is a federal law for that. That dispute can be resolved by looking to the federal statutory and regulatory scheme Congress created precisely for such disputes—*i.e.*, the FLSA.

If Newton's claims are broken down into their component parts, the applicability and comprehensiveness of the FLSA is equally clear. Newton's first and sixth claims allege minimum-wage

and overtime violations. J.A.18-20, 28-30. The FLSA addresses those issues by "establish[ing] federal minimum-wage, maximum-hour, and overtime guarantees." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 69 (2013). Newton's second claim alleges pay stub violations, J.A.20-22, which the FLSA addresses by, *inter alia*, requiring employers to keep records of hours worked and wages paid, 29 U.S.C. §211(c). Newton's fourth claim alleges failure to timely pay final wages, J.A.24-26, which the FLSA addresses by imposing penalties on employers who fail to pay terminated employees on the next regularly scheduled payday, 29 U.S.C. §216(b); Pet.App.58. Newton's fifth claim alleges a failure to provide valid meal periods, J.A.26-28, which the FLSA addresses by requiring employers to compensate employees for any meal period that is not "bona fide," 29 C.F.R. §785.19. In short, whether examined generally or in light of the specific claims alleged in this case, the FLSA leaves no gaps for state law to fill.[6]

2. The Ninth Circuit never claimed that there was a gap in federal wage-and-hour law or any need to replace existing federal law with California wage-and-hour rules converted into limited-purpose federal law.

---

[6] Newton's third claim, for unfair competition, is based on the same predicate acts as his wage and meal-period claims. J.A.22-24. Likewise, his seventh claim seeks civil penalties for acts described in the other claims. J.A.30-35. The Ninth Circuit ruled only on Newton's minimum-wage and overtime claims (*i.e.*, first and sixth claims), remanding the rest for the district court to assess in light of the court's interpretation of OCSLA. Pet.App.35-40. Because those claims necessarily fail under the proper interpretation of OCSLA, this Court should direct that they be dismissed as well.

Instead, the Ninth Circuit deemed the entire question of whether there was a gap in federal law irrelevant. In the Ninth Circuit's view, state law is "applicable" to the OCS as long as it "pertain[s] to the subject matter at hand." Pet.App.21. That interpretation—the product of simply looking at the dictionary definition of a single word in isolation—disregards the broader statutory context and produces a result that Congress could not have intended. Congress considered and rejected proposals to make state law apply of its own force whenever it was relevant to a dispute arising on the OCS. The Ninth Circuit's ruling produces nearly the same result, with the twist that state law is presumptively applicable to the OCS but only after being converted into federal law that must be administered by federal officials. Congress did not embrace that bizarre regime in OCSLA, but rather treated the OCS as an exclusively federal enclave where federal law is exclusive when applicable, and state law is inapplicable in the absence of a gap in federal law. The decision below is thus not only wrong as a textual matter, but defies Congress' fundamental judgment that the OCS should be an exclusively federal enclave on which federal law is the rule, and state law the exception.

The Ninth Circuit's construction of "applicable" was the product of a flawed brand of textualism that defies this Court's precedents. "Statutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). Rather, "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* By focusing simply on the dictionary definition of a single word in a vacuum, instead of construing OCSLA as a

whole, the Ninth Circuit contravened this Court's command to "consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995).

In construing the word "applicable" in §1333(a)(2)(A) in isolation, the Ninth Circuit jumped right past §1333(a)(1) and its direction that all federal law "extend[s]" to the OCS as if the OCS were a federal enclave within a state. That error left the court without the context necessary to understand the specific problem that Congress was trying to solve in §1333(a)(2)(A)—declaring additional federal law to fill the gaps in the federal law "extended" under §1333(a)(1)—and the background principles against which Congress used the word "applicable," *viz.*, only the kind of state laws that would be "applicable" to a federal enclave.

When Congress enacted OCSLA in 1953, it was well understood that state law applied in newly created federal enclaves only if needed to fill gaps in federal law. *See McQuiggin v. Perkins*, 569 U.S. 383, 398 n.3 (2013) ("Congress legislates against the backdrop of existing law"). Under longstanding federal-enclave doctrine, if pre-existing state law touched "upon the same matters" as federal law, it was "necessarily ... superseded" by federal law upon creation of the enclave; if not, it remained applicable until "altered or repealed." *See, e.g.*, *McGlinn*, 114 U.S. at 546-47. This rule ensured that federal enclaves would be principally regulated by federal law supplied by federal authorities but would not "be left without a developed legal system for private rights."

James Stewart & Co. v. Sadrakula, 309 U.S. 94, 99-100 (1940).

When Congress establishes a typical federal enclave—*e.g.*, when it acquires land from a state—it need not spell out the foregoing rule; the rule operates automatically because there is already pre-existing state law to fill the gaps. But because the OCS was never part of any state, there was no pre-existing state law to remain in force. As a result, Congress had to take affirmative steps to fill the gaps in federal law—which it did with §1333(a)(2)(A). In providing that state laws would be declared to be federal law "[t]o the extent they are applicable," Congress used the term "applicable" to refer to state laws that apply in a federal enclave—*i.e.*, those laws necessary to supplement federal law and complete "a developed legal system for private rights" on the OCS, *Sadrakula*, 309 U.S. at 99-100—not to refer to state laws that covered "the same matters" already addressed by federal law, *McGlinn*, 114 U.S. at 546, which have no place on the OCS.

Accordingly, while the Ninth Circuit's expansive definition of "applicable" is certainly one of the possible meanings of that word, it is hardly the only meaning, and the balance of the text of §1333(a) and the broader statutory context make clear it is not the meaning Congress intended. This Court's recent decision in *Ransom v. FIA Card Services*, 562 U.S. 61 (2011), is instructive. There, the Court was called upon to interpret the word "applicable" in the phrase "applicable monthly expense amount." 11 U.S.C. §707(b)(2)(A)(ii)(I). The Court began by citing dictionaries that defined "applicable" broadly as

"appropriate, relevant, suitable, or fit." *Ransom*, 562 U.S. at 69-70. But instead of stopping there and adopting a broad definition of "applicable," the Court considered what meaning of applicable made the most sense in light of the statute's "text, context, and purpose." *Id.* at 80; *see id.* at 69-74. The Court concluded that Congress must have used the word "applicable" as a limiting term—*i.e.*, to "filter[] out debtors for whom a deduction is not at all suitable." *Id.* at 74. Here, Congress' use of the word "applicable" serves a similar function, conveying that only a subset of state laws are suitable to be adopted as federal law on the OCS—specifically, those laws that fill gaps in federal law by addressing subjects that could arise in a federal enclave that are not already addressed by federal law.

The conclusion that Congress intended the word "applicable" to serve a filtering function is strongly reinforced by the surrounding text. By addressing the process for declaring state law to be federal law "[t]o the extent that [state laws] are applicable," §1333(a)(2)(A) necessarily assumes there is some extent to which state laws are inapplicable to the OCS. While the text may not supply that answer, the broader statutory context does: State laws are applicable to the OCS as surrogate federal law to the extent there is a gap in ordinary federal law; if there is no gap, state laws are inapplicable.

That conclusion is buttressed by the balance of §1333(a)(2)(A), which does not end with the sentence providing for the adoption of state laws "[t]o the extent that they are applicable and not inconsistent." It goes on to specify that the applicable state law is declared

to be federal law, and "[a]ll of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." This conversion of state law into federal law and assignment of administrative authority over such laws to federal officials should have provided strong clues to the Ninth Circuit that its expansive view of "applicable" state laws was dubious. It is hard to imagine that Congress wanted to take the rather extraordinary step of converting state law into federal law when doing so was unnecessary. Why would Congress want courts to look to Sacramento when Congress itself already provided an answer in the FLSA? It is even harder to imagine Congress wanted to task federal officials with enforcing two competing sets of federal laws when there is perfectly serviceable federal law already in place. Yet apart from quoting language from *Continental Oil* that laws on the OCS were to be "federally administered," Pet.App.22 (quoting 417 F.2d at 1036), the Ninth Circuit wholly disregarded the absurdities produced by its reading of "applicable."

Last but certainly not least, the Ninth Circuit adopted a definition of "applicable" that renders the word superfluous in §1333(a)(2)(A). If all Congress meant was that state law must "pertain to the subject matter at hand," it could have omitted the word "applicable" altogether, because the only state laws that could *ever* apply to a dispute on the OCS are ones that pertain to the subject matter at issue. The Ninth Circuit's reading of the statute thus violates the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute." *Loughrin v. United States*, 573 U.S. 351, 358

(2014). In contrast, interpreting OCSLA such that state laws apply to the OCS only to the extent there is a gap in federal law "ensures that the term 'applicable' carries meaning, as each word in a statute should." *Ransom*, 562 U.S. at 70.[7]

C. California Wage-And-Hour Law Does Not Extend to the OCS Because It is Inconsistent With the FLSA.

1. Even if California wage-and-hour law were otherwise "applicable" to the OCS, it still would not provide the content of federal law on the OCS because California wage-and-hour law is "inconsistent with" the federal wage-and-hour law embodied in the FLSA. 43 U.S.C. §1333(a)(2)(A). Indeed, if the Ninth Circuit's reading of "applicable" were correct and state law were applicable to the OCS whenever it pertains to the subject matter at hand, it would be particularly important to have a relatively undemanding standard of inconsistency, lest state law govern on the OCS as a matter of course. But whatever the outer limits of inconsistency, there can be no serious question but

---

[7] In his brief in opposition, Newton argued that Congress included the word "applicable" only to avoid confusion between, on the one hand, OCSLA's command in §1333(a)(2)(A) that "applicable and not inconsistent" state law be adopted as federal law, and, on the other hand, a sentence at the end of that provision stating that "State taxation laws shall not apply to the outer Continental Shelf." This argument—which the Ninth Circuit did not adopt—is fanciful. No one could possibly be confused by the words "shall not apply," and Congress' effort to supply a general rule for when state law is declared to be federal law governing the OCS should not be distorted (much less in a pro-state-law direction) by a provision making crystal clear that one type of state law *should not* apply.

that California wage-and-hour law and the FLSA are glaringly inconsistent and thus there is no role for California wage-and-hour law to serve as a second body of federal wage-and-hour law applicable to the OCS.

The reality that California wage-and-hour law and the FLSA are inconsistent is perhaps most obviously illustrated by one of the most important aspects of any wage-and-hour law: the applicable minimum wage. Federal law sets the applicable minimum wage at $7.25, while California sets it at $12. Those two different minimum wages are plainly inconsistent. This is not to say it is impossible for an employer to comply with both laws, but that does not render the two wages consistent. Instead, the employer complies by paying the higher of the two inconsistent minimum-wage laws.

The inconsistency between the two minimum-wage laws is particularly unmistakable if they are imposed by the same sovereign. An employer well-schooled in federalism might perceive only a degree of inconsistency between a federal minimum wage and a higher state minimum wage. But if the same federal authorities are telling the employer that the minimum wage is $7.25 and $12, the inconsistency is unmistakable. That is, however, the precise regime that the Ninth Circuit has introduced on the OCS, because under OCSLA, both the FLSA and the federal rule borrowed from California are *federal* minimum wages administered by *federal* officials. For the federal minimum wage to simultaneously be $7.25 and $12 is as inconsistent as it gets.

The same inconsistency exists between the California rules for sleep and off-duty time and the FLSA rules on the same subject. Indeed, the California Supreme Court in *Mendiola* interpreted a state wage-and-hour order that expressly rejected the FLSA approach to off-duty time, and the California Supreme Court applied that rule with a full understanding that it was inconsistent with the FLSA. Newton, for his part, has never claimed that Parker's method of calculating "hours worked" violated the FLSA, yet he alleges that the very same method of calculation violates what he would have the courts apply as a second body of federal wage-and-hour law. Indeed, Newton's complaint is itself undeniable proof that the FLSA and California wage-and-hour law are inconsistent. If the FLSA were consistent with the state laws at issue here, Newton presumably would have filed his claims under the FLSA as well. Instead, the FLSA is entirely unmentioned in his complaint. The fact that Newton did not perceive that he had any cause of action under the FLSA, and accordingly did not include those claims or even file his lawsuit until after *Mendiola* was decided, confirms that California wage-and-hour law as interpreted in *Mendiola* is inconsistent with the FLSA.

Under the comprehensive statutory scheme enacted by Congress, Newton works 84 hours in a typical seven-day workweek; under a competing scheme promulgated by California regulators, Newton works 168 hours in a typical seven-day workweek. Under the FLSA, Parker complied with its overtime-pay obligations by compensating Newton for 44 hours of overtime each week; under the competing scheme,

Parker faces the prospect of massive retroactive liability and civil penalties for failing to compensate for an additional 84 hours of overtime (128 total hours of overtime) each week. There is no sense in which these competing commands regarding "hours worked" are consistent in this case, and OCSLA explicitly prohibits plaintiffs from invoking inconsistent state laws to supplant Congress' regulatory judgments on the OCS.[8]

2. Just as the Ninth Circuit never claimed that there was a gap in federal law, it openly acknowledged that "California's minimum wage and overtime laws ... establish different and more generous benchmarks than the ... FLSA's statutory and regulatory scheme." Pet.App.36-37. It held, however, that the differences between state and federal law did not make them "inconsistent" for OCSLA purposes because the FLSA's saving clause "explicitly permits more protective state wage and hour laws."

---

[8] OCSLA's twin requirements that state law be both "applicable" and "not inconsistent with" federal law work together to achieve Congress' vision that federal law would be the rule on the OCS and that state law would be borrowed only where necessary. To be sure, the view that state law is not applicable absent a gap in federal law means that there will be relatively few cases where state law is applicable but nonetheless inconsistent with federal law. But it will not be the null set, as there are circumstances where the gap in federal law is produced by a federal deregulatory preference, or the application of state law creates a conflict with federal law addressing a different issue from the one on which federal law leaves a gap. Similarly, when state law and federal law address the same subject in similar ways, state law will be "inapplicable" to the OCS even though fully consistent with federal law. Thus, both requirements perform independent work.

Pet.App.36; *see* 29 U.S.C. §218(a). According to the Ninth Circuit, Congress' decision to allow states to impose more demanding requirements on employers operating within their borders means there is no actual inconsistency when there are two different federal minimum wages or two different federal sleep-time rules on the OCS. *See* Pet.App.36-39.

That analysis is flawed in at least two critical respects. First, the Ninth Circuit's effort to use the FLSA's saving clause to avoid recognizing an inconsistency between California wage-and-hour law and the FLSA ignores that the saving clause is triggered only by *an inconsistency* between state and federal law. As long as state wage-and-hour law and the FLSA are consistent (or the state law is less protective of workers), the saving clause is not implicated. By its terms, the clause is applicable only when the state minimum wage is "higher," or the state maximum work week is "lower," than what federal law prescribes. 29 U.S.C. §218(a). Thus, the fact that the Ninth Circuit recognized that the FLSA's saving clause would be triggered if this case arose in California actually demonstrates that state and federal law *are* inconsistent—not the opposite.[9]

---

[9] The FLSA's saving clause "saves" the application of more demanding federal laws. *See* 29 U.S.C. §218(a). But that aspect of the saving clause is of no assistance to Newton, because §1333(a)(2)(A) provides that a state law is converted into federal law applicable to the OCS only if the state law is "not inconsistent with" federal law. Section 1333(a)(2)(A) focuses on whether the *state* law is inconsistent; if so, that state law is never converted into federal law. Thus, relying on the saving clause's reference to inconsistent federal laws puts the cart before the horse, which

Second, and more fundamentally, not only does the FLSA's saving clause highlight the inconsistency between California wage-and-hour law and the FLSA, but the saving clause's interests in preserving state law and accommodating state sovereignty are wholly inapposite on the OCS. The saving clause directs employers operating within a state who may be facing inconsistent state and federal laws to comply with the more demanding state law out of a respect for state sovereignty and federalism. Those principles have no purchase whatsoever on the OCS. Not only did the states have no claim to sovereignty over the OCS to begin with; in OCSLA, Congress explicitly rejected any claim of state sovereignty over the OCS and made all law on the OCS federal law, 43 U.S.C. §1333(a)(1). In doing so, Congress "emphatically implemented its view that the United States has paramount rights" to the OCS. *Shell Oil*, 488 U.S. at 27. To avoid any confusion over the matter, Congress went out of its way to stress that the adoption of state law as federal law "shall never" be construed as a basis for any state to claim "any interest in or jurisdiction" over the OCS "for any purpose." 43 U.S.C. §1333(a)(3).

Given these elaborate congressional efforts to assert the federal government's exclusive jurisdiction over the OCS, the Ninth Circuit's reliance on the FLSA's saving clause, which "simply makes clear that the FLSA does not preempt any existing state law" establishing a higher minimum wage or shorter workweek, *Cosme Nieves v. Deshler*, 786 F.2d 455, 452 (1st Cir. 1986), is deeply misguided. Preemption

---

is presumably why the Ninth Circuit focused on the extent to which the saving clause saves inconsistent state laws.

doctrine is designed to accommodate the fact that "the States possess sovereignty concurrent with that of the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). There is no concurrent or dual sovereignty on the OCS. As the Fifth Circuit has noted, OCSLA cases do not implicate the "undulating conflicts of state versus national power inevitable and irrepressible in our unique federalism." *Pure Oil Co. v. Snipes*, 293 F.2d 60, 63 (5th Cir. 1961).

The Ninth Circuit nevertheless took a clause designed to respect California's undeniable sovereignty over Fresno and used it to ignore a plain inconsistency between two competing federal wage-and-hour regimes on the OCS, one supplied by Congress and one borrowed from California as federal law. Remarkably, the Ninth Circuit's approach puts into operation nearly the same scheme that Congress rejected in OCSLA. In the Ninth Circuit's view, state law controls on the OCS whenever it pertains to the plaintiff's lawsuit and is not preempted by federal law. *See* Pet.App.36. But that is just how state law applies to areas within states that are *not* federal enclaves: relevant state law applies unless preempted by federal law. Of course, Congress considered treating the OCS that way, but chose not to. *See Rodrigue*, 395 U.S. at 358-59. And Congress did not subvert that fundamental judgment based on a peculiar notion of "consistency." The Ninth Circuit's interpretation thus violates both the elephants-in-mouseholes canon, *see Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and the rule that "Congress does not intend *sub silentio* to enact statutory language that it has

earlier discarded in favor of other language," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).[10]

D. Applying California Wage-and-Hour Law on the OCS Makes No Sense and Produces Results Congress Never Intended.

Creating duplicative federal wage-and-hour rules by borrowing dissimilar California law as surrogate federal law fails the test of common sense. There is simply no good reason to go through the trouble of borrowing state law, converting it into federal law, and charging federal officials with regulatory authority over the result of that alchemy when a ready-made federal wage-and-hour law is hiding in plain sight.

But the problems with the Ninth Circuit decision do not end there. First, the Ninth Circuit's ruling would produce a federal wage-and-hour regime on OCS platforms off the California shore that is completely different from that on OCS platforms off the Gulf Coast (where the adjacent states have not adopted California-like wage-and-hour policies), even though the same operators are active in both regions. One of Congress' reasons for favoring federal law on the OCS was that making federal law exclusive would promote uniformity and "provide[] for the orderly

---

[10] Using the FLSA's saving clause to smuggle state wage-and-hour law onto the OCS would make the OCS an outlier among federal enclaves. Congress has not provided the "clear and unambiguous" authorization necessary for state wage-and-hour laws to apply in federal enclaves. *See Allison*, 689 F.3d at 1238 ("[N]o federal statute yet allows the broad application of state employment ... law to federal enclaves.").

development of offshore resources." *United States v. Maine*, 420 U.S. 515, 527 (1975). To be sure, Congress understood there would be gaps in federal law and authorized courts to look to state law to fill those gaps. But if state rules are routinely borrowed even though federal law already provides a federal rule, inconsistent results are *needlessly* introduced. Congress did not make the OCS a federal enclave only to make it a laboratory for state experimentation when Congress itself had already provided answers to the questions at issue.

Another of Congress' concerns in OCSLA was to ensure that state-level officials would not regulate the OCS. *See Cont'l Oil*, 417 F.2d at 1036 ("[T]he notion of supremacy of state law administered by state agencies was expressly rejected."). To ensure that result, Congress specified that even when state law was borrowed for the OCS, federal officials would be responsible for administering that law. 43 U.S.C. §1333(a)(2). Having federal officials administer state law "declared" to be federal law is anomalous, but Congress preferred it when the only alternative would be having state officials administer state law on the OCS. But the Ninth Circuit's expansive interpretation of "applicable and not inconsistent with" would turn what is now a tolerable irregularity into an intolerable regularity, as this case demonstrates. The prospect of federal wage-and-hour officials already responsible for administering the FLSA both on and off the OCS simultaneously having to administer a different body of state laws addressing the same topics with conflicting results has nothing to recommend it. *Cf. Lewis v. United States*, 523 U.S. 155, 163-64 (1998). It is highly unlikely that

Congress, by permitting the adoption of a subset of state laws on a federal enclave, meant to charge agencies like the Department of Labor with the monumental task of enforcing not just the FLSA provisions with which it has "expertise and experience," *Judulang v. Holder*, 565 U.S. 42, 53 (2011), but also every non-preempted wage-and-hour law of every coastal state. This Court should not presume that Congress intended to saddle federal agencies with such burdensome and unfamiliar requirements unless Congress' intent is unmistakable.

Relatedly, the Ninth Circuit's view would lead to highly complex problems for federal administrators. To take just one example, the California Supreme Court has admonished that the state's "[w]age and hour laws are to be construed so as to promote employee protection." *Mendiola*, 340 P.3d at 359. By contrast, this Court has rejected the notion that the FLSA should be given "anything but a fair reading" favoring neither the employer nor the employee. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). If federal officials (or federal courts) are applying both adopted California law and the FLSA, do they put a thumb on the employees' side of the scale for one federal law, while giving a "fair reading" to the other? The need to answer such perplexing questions would make administration of federal law on the OCS far more daunting than administration of federal law generally, something that Congress can hardly have intended by making the OCS "an area of exclusive federal jurisdiction." 43 U.S.C. §1333(a)(1).

Creating duplicative federal wage-and-hour regimes by adopting California law would also impede employers and employees on the OCS from working together to craft mutually beneficial compensation frameworks that take into account the unique nature of employment on the OCS. For example, many employers and employees have agreed to exclude sleep time from hours worked, as expressly permitted by federal law. *See* 29 C.F.R. §785.22. Under California law, however, such agreements are ineffective in all but a few select industries. *See Mendiola*, 340 P.3d at 365-66. The Ninth Circuit's holding would thus force employers and employees into compensation plans that differ from agreements they voluntarily negotiated, which, unlike California wage-and-hour law, were specifically tailored to the distinctive circumstances of work on offshore drilling platforms.

Furthermore, the Ninth Circuit's decision opens up the prospect that state officials with a different and dimmer view of OCS operations than the federal government may impose burdensome policies on OCS operators. The federal government has emphasized that it is "the policy of the United States to encourage energy exploration and production ... on the" OCS. Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). Its most recent proposal "would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019–2024 period," including areas off the coast of *every* coastal State. *See* U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* at 1, 8-9 (Jan. 2018), https://bit.ly/2lU8cCV. Similarly, the federal government recently announced that over

1,000 square miles of the OCS off the California coast may be made available for offshore wind farms. *See* U.S. Dep't of the Interior, *Trump Administration Delivers Historic Progress on Offshore Wind* (Oct. 18, 2018), https://on.doi.gov/2NOwIBc.

Under the Ninth Circuit's vision of an expansive role for state law on the OCS, states may attempt to enact laws that increase the difficulty and cost of OCS operations, deterring activity the federal government seeks to encourage. *See, e.g.*, Jeff Daniels, *California Gov. Jerry Brown Moves to Block Trump on Offshore Drilling: "Not Here, Not Now,"* CNBC (Sept. 8, 2018), https://perma.cc/6DDJ-6JFV (discussing California legislation intended "to thwart" federal government's "efforts to expand offshore oil drilling along the California coast"); Gavin Newsom (@GavinNewsom), Twitter (Feb. 7, 2018), https://perma.cc/WWJ9-962T ("Got news for you, @realDonaldTrump -- not a single drop from your new oil plan will ever make landfall in CA."). Allowing states to interfere with OCS operations is plainly inconsistent with Congress' basic judgment in OCSLA to make the OCS an enclave of exclusive federal jurisdiction where only federal law governs. And it is doubtful that the Congress that enacted OCSLA with mineral revenue in mind, *see* 43 U.S.C. §1333(a)(3), would have wanted to allow states to so easily be able to disrupt operations on the OCS.

Finally, as this case demonstrates, the decision below encourages opportunistic plaintiffs to file copycat suits addressed to the OCS every time a state broadens its wage-and-hour protections (or any other state laws that would apply under the Ninth Circuit's rule, for that matter). *See* pp.12-14, *supra*. Such a

result not only would provide a massive windfall to employees who were at all times compensated in accordance with the FLSA, but also would expose employers who undisputedly complied with the FLSA on platforms governed exclusively by federal law to the prospect of massive retroactive liability. Those employers, who have long relied on the unquestioned proposition that the FLSA is the exclusive source of wage-and-hour law on the OCS, have now been blindsided by the Ninth Circuit's holding that state wage-and-hour standards also apply as overlapping federal law and have done so all along. This Court has repeatedly rejected similar efforts by the Ninth Circuit to expose settled industry practices to massive, unexpected liability, *see Encino Motorcars*, 138 S. Ct. 1134; *Integrity Staffing Sols. v. Busk*, 135 S. Ct. 513 (2014); *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012), and should do so again here.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted,

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(650) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
MICHAEL D. LIEBERMAN
LAURA WOLK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Petitioner

February 20, 2019

STATUTORY APPENDIX

TABLE OF CONTENTS

43 U.S.C. § 1332(1) 1a
43 U.S.C. § 1333(a) 1a

43 U.S.C. § 1332(1)

It is hereby declared to be the policy of the United States that—

> (1) The subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

* * *

43 U.S.C. § 1333(a)

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

> (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2) (A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State

---

[1] So in original. Probably should be "settling".

for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

No. 18-389

IN THE
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

MICHAEL A. STRAUSS
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 N. Fir Street
Suite F
Ventura, CA 93001
(805) 641-6600

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350

DAVID C. FREDERICK
Counsel of Record
ANA NIKOLIC
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

March 22, 2019

QUESTION PRESENTED

The Outer Continental Shelf Lands Act ("OCSLA") declares that, "[t]o the extent that they are applicable and not inconsistent with" federal laws and regulations, the civil and criminal laws of an adjacent State are "the law of the United States" for the Outer Continental Shelf. 43 U.S.C. § 1333(a)(2)(A). The Fair Labor Standards Act of 1938 ("FLSA") sets a national floor for wage-and-hour standards and contains a savings clause preserving enforcement of more generous federal, state, or local minimum-wage and maximum-hour laws. California's Labor Code is such a law, setting certain wage-and-hour standards that are more generous than the provisions in the FLSA. Onshore, there is no question that, under the ordinary meaning of the terms, California's Labor Code is both "applicable" and "not inconsistent" with federal law.

The question presented is:

Should "applicable" and "not inconsistent" in OCSLA be interpreted according to their ordinary meanings, such that California's Labor Code, which is both "relevant, suitable, and fit" and not "incompatible" with the FLSA, applies to employee compensation for drilling activities on the Outer Continental Shelf?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

INTRODUCTION 1

STATEMENT 3

A. Statutory Background 3

1. Pre-OCSLA Drilling and Regulation on the Outer Continental Shelf 3

2. The Submerged Lands Act 5

3. OCSLA 5

4. 1975 OCSLA Amendments 8

5. 1978 OCSLA Amendments 9

6. The Fair Labor Standards Act 11

7. The California Labor Code 12

B. Procedural History 13

SUMMARY OF ARGUMENT 16

ARGUMENT 21

I. STATE LAW APPLIES ON THE OCS IF IT IS "APPLICABLE" AND "NOT INCONSISTENT" WITH FEDERAL LAW 21

A. Under The Ordinary Meaning Of "Applicable," State Legal Standards Apply On The OCS If They Are Relevant, Suitable, Or Fit 21

B. Under The Ordinary Meaning Of "Not Inconsistent," State Law That Is Not Incompatible With Or Not Contradictory To Federal Law Applies On The OCS 27

II. CALIFORNIA'S WAGE-AND-HOUR LAWS ARE RELEVANT AND NOT INCOMPATIBLE WITH THE FLSA 28

A. California's Wage-And-Hour Laws Are "Applicable" Because They Are Relevant To The Pertinent Subject Matter..... 28

B. California's Wage-And-Hour Laws Are "Not Inconsistent" With Federal Law Because Both The FLSA And OCSLA Contemplate Application Of More Protective State Labor Laws 29

III. PETITIONER'S ARGUMENTS LACK MERIT 33

A. Accepted Principles Of Statutory Interpretation Preclude Petitioner's Reading Of "Applicable" 33

1. The statutory text lends no support to petitioner's contention that "applicable" should be interpreted to require a gap in federal law before state law applies..... 33

2. Petitioner misunderstands how law applies on federal enclaves..... 37

3. Petitioner ignores important distinctions Congress established between "jurisdiction," "administration and enforcement," and "applicable" law 41

4. Any purported ambiguities in the legislative history cannot override the text's plain meaning..... 42

B. Petitioner's Attempt To Manufacture Inconsistency Between California's Wage-And-Hour Laws And The FLSA Ignores Both Statutes' Text And Purpose 45

1. "Not inconsistent" does not mean "not different" 45

2. Nothing in OCSLA requires ignoring the FLSA's savings clause 49

IV. PETITIONER'S APPROACH CREATES ADMINISTRABILITY PROBLEMS 51

A. Sound Policy Counsels For Making The Same Legal Standards Apply To Employees Working Onshore Or Offshore 51

B. Petitioner's Interpretation Disrupts Established Methods Of Applying State Laws On Federal Enclaves 52

C. Other Policy Considerations Argue For Rejecting Petitioner's Interpretation 52

CONCLUSION 56

TABLE OF AUTHORITIES

Page

CASES

Adkins v. Arnold, 235 U.S. 417 (1914) 28

Artis v. District of Columbia, 138 S. Ct. 594 (2018) 21

Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728 (1981) 29, 32

California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) 50

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 7, 8, 19, 20, 25, 26, 32, 37, 43, 44, 52

Chicago, R.I. & P. Ry. Co. v. McGlinn, 114 U.S. 542 (1885) 40

Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n, Ltd., 417 F.2d 1030 (5th Cir. 1969) 14, 41, 42

Cortez v. Purolator Air Filtration Prods. Co., 999 P.2d 706 (Cal. 2000) 13

Franklin v. Lynch, 233 U.S. 269 (1914) 27, 28

Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981) 26, 27, 28, 32, 53

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993) 8

Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238 (2000) 21

Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) 23

James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940) 6-7, 38, 39, 40

Jimenez v. Quarterman, 555 U.S. 113 (2009) 21

Kasten v. Saint-Gobain Performance Plastics Corp., 563 U.S. 1 (2011) 29

Korndobler v. DNC Parks & Resorts at Sequoia, No. 1:15-cv-00459-LJO-SKO, 2015 WL 3797625 (E.D. Cal. June 18, 2015) 41

Lamie v. United States Tr., 540 U.S. 526 (2004) 42

Lewis v. United States, 523 U.S. 155 (1998) 35, 51

Mendiola v. CPS Sec. Sols., Inc., 340 P.3d 355 (Cal. 2015) 47

Mendoza v. Nordstrom, Inc., 393 P.3d 375 (Cal. 2017) 12

Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 6

Pacific Merch. Shipping Ass'n v. Aubry, 918 F.2d 1409 (9th Cir. 1990) 11, 28, 29

Pacific Operators Offshore, LLP v. Valladolid, 565 U.S. 207 (2012) 5, 32, 42

Paul v. United States, 371 U.S. 245 (1963) 7, 39, 40

People v. Weeren, 607 P.2d 1279 (Cal. 1980) 3

Powell v. United States Cartridge Co., 339 U.S. 497 (1950) 12, 17, 20, 31, 32, 46, 49

Ransom v. FIA Card Servs., N.A., 562 U.S. 61 (2011) 36

Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969) 7, 24, 25, 43

Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988) 4, 5, 6

Spoerle v. Kraft Foods Glob., Inc., 614 F.3d 427 (7th Cir. 2010) 47

Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980) 48, 49

Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944) 32

Tidewater Marine Western, Inc. v. Bradshaw, 927 P.2d 296 (Cal. 1996) 28

Union Texas Petroleum Corp. v. PLT Eng'g, Inc., 895 F.2d 1043 (5th Cir. 1990) 42

United States v. California, 332 U.S. 19 (1947) 3, 4

United States v. Louisiana, 339 U.S. 699 (1950) 3, 4

United States v. Maine, 420 U.S. 515 (1975) 5

United States v. Sharpnack, 355 U.S. 286 (1958) 9

United States v. State Tax Comm'n of Mississippi, 412 U.S. 363 (1973) 38, 39, 40

United States v. Texas, 339 U.S. 707 (1950) 3, 4

Williams v. Taylor, 529 U.S. 362 (2000) 37

STATUTES AND REGULATIONS

Act of Feb. 19, 1903, ch. 707, 32 Stat. 841-42 28

Assimilative Crimes Act of 1948, ch. 645, 62 Stat. 683 ..... 9, 35, 54

§ 13, 62 Stat. 686 9

18 U.S.C. § 13 ..... 9, 54

18 U.S.C. § 13(a) 35

Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 35

42 U.S.C. § 1988(a) 35

Clean Air Act, 42 U.S.C. § 7401 *et seq.* 53

§ 118, 42 U.S.C. § 7418 54

§ 328, 42 U.S.C. § 7627 ..... 53, 54

§ 328(a)(1), 42 U.S.C. § 7627(a)(1) 53

§ 328(a)(3), 42 U.S.C. § 7627(a)(3) 54

Clean Water Act, 33 U.S.C. § 1251 *et seq.*:

33 U.S.C. § 1323 54

Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* 10-11

§ 1456(c)(3)(B) 11

Death on the High Seas Act, 46 U.S.C. § 30301 *et seq.* 24, 25

Deepwater Port Act of 1974, Pub. L. No. 93-627, 88 Stat. 2126 (1975) 8

§ 19(f), 88 Stat. 2146 ..... 8, 9

33 U.S.C. § 1501 8

Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.* ..... *passim*

§ 202(a) 11, 29, 32

§ 206 ..... 11, 17

§ 206(a) 31, 49

§ 206(a)(1) 29, 46, 49

§ 207 ..... 11, 17

§ 207(a) 29, 49

§ 211(c) 11, 48

§ 216(b) 48

§ 218(a) 11, 17, 29, 31

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* 42, 48

Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* ..... *passim*

§ 1331(i) 10, 23, 33

§ 1332(5) 9, 16, 23, 33

§ 1333 34

§ 1333(a)(1) 5, 24, 34, 41

§ 1333(a)(2) (1970) 6, 8, 9

§ 1333(a)(2) (1976) 9

§ 1333(a)(2)(A) 10, 16, 22, 23, 24, 25, 26, 28, 34, 40, 41, 42

§ 1333(a)(3) 41

§ 1334 42

§ 1334(a) 10, 41, 54

§ 1340(c) 11

§ 1345(e) 10, 23, 55

§ 1351(d) 11

§ 1356a(d)(1) 24

Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629 10

Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978) 50

Solid Waste Disposal Act, 42 U.S.C. § 6901 *et seq.*:

42 U.S.C. § 6961 54

Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* 5

Walsh-Healey Act, ch. 881, 49 Stat. 2036 31

42 U.S.C. § 2000h-4 50

California Fair Employment and Housing Act, Cal. Gov't Code § 12900 *et seq.* 50

Cal. Fish & Game Code § 3961 ..... 22, 37

Cal. Lab. Code:

§ 201 12

§ 201(a) 48

§ 202 12

§ 226 12

§ 226(a) 48

§ 510 13

§ 510(a)(2) 55

§ 512 13

§ 512(a) 48

§ 514 55

§ 1182.12(b)(1)(C) 31

§ 1194 12

§ 1197 12

La. Stat. § 51:1941 *et seq.* 22

Private Attorneys General Act of 2004, Cal. Lab. Code § 2698 *et seq.* 13

§ 2699(a) 13

Tex. Gov't Code § 3101.010 22

29 C.F.R.:

§ 531.26 30

§ 778.5 ..... 30, 35

§ 785.1 47

§ 785.16(a) 47

§ 785.19 48

§ 785.22(b) 47

36 C.F.R.:

§ 2.15(b) 52

§ 5.2(a) 52

§ 241.23(a) 52

40 C.F.R. § 55.15 54

8 Cal. Code Regs.:

§ 11140 22

§ 11160 12

§ 11160.2(J) 13

§ 11160.3(B)(1)(h) 56

§ 11160.3(H)(2) 55

ADMINISTRATIVE MATERIALS

Cal. Dep't of Indus. Relations, *The Laws Relating to the Time, Manner and Payment of Wages* (Oct. 2013), https://www.dir.ca.gov/dlse/lawstimemannerpaymentwages.pdf 12

Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2019, 83 Fed. Reg. 44,906 (Sept. 4, 2018) 49

Notice, Oil and Gas Operations in the Submerged Coastal Lands of the Gulf of Mexico, 15 Fed. Reg. 8835 (Dec. 13, 1950) 4

Notice, Oil and Gas Operations in Submerged Coastal Lands of Gulf of Mexico, 17 Fed. Reg. 5833 (June 28, 1952) 4

Presidential Press Release (Sept. 28, 1945) 4

Presidential Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945) 4

Tr. of Pub. Hr'g of Cal. Indus. Welfare Comm'n (Oct. 5, 2000), *available at* https://www.dir.ca.gov/iwc/PUBHRGo5.htm 51, 52

U.S. Dep't of Labor:

Administrator's Interpretation No. 2016-2, "Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act" (Nov. 17, 2016), https://www.dol.gov/whd/opinion/AdminIntrprtn/FLSA/2016/FLSAAI2016_2.pdf 30

Employment Laws Assistance for Workers and Small Businesses, "Meal Period and Rest Breaks," https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEE4.asp (last visited Mar. 18, 2019) 12

LEGISLATIVE MATERIALS

99 Cong. Rec. (1953):

p. 6963 49

pp. 6963-64 ..... 8, 49

p. 7264 44

H.R. Conf. Rep. No. 83-1031 (1953) 45

S. Rep. No. 75-884 (1937) 11

S. Rep. No. 83-411 (1953) 8

S. Rep. No. 93-1217 (1974), 1974 U.S.C.C.A.N. 7529 8

OTHER MATERIALS

Answering Br., *Curtis v. Irwin Indus., Inc.*, No. 16-56515 (9th Cir. Feb. 28, 2018) 55

Black's Law Dictionary (4th ed. 1951) 21, 27

Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23 (1953) 7, 8

Robert Easton, *Blacktide* (New York, N.Y.: Delacorte Press, 1972) 9

Employment Agreement, *Jensen v. Safety Equip. Corp.*, No. 2:18-cv-02890-RGK-GJS, ECF #28-12 (C.D. Cal. July 5, 2018) 55

William L. Leffler, Richard Pattarozzi & Gordon Sterling, *Deepwater Petroleum Exploration & Production: A Nontechnical Guide* (Tulsa, Okla.: PennWell Corp., 2003) 3

Webster's Universal Dictionary (1953) 21, 27, 28

INTRODUCTION

In 1953, Congress enacted the Outer Continental Shelf Lands Act ("OCSLA") to clarify that federal law would govern offshore activities that had begun on the Outer Continental Shelf ("OCS") under state law. Recognizing the connection between operations on the shelf and the adjacent State's shore, Congress provided that state law would be incorporated into the federal law of the OCS to the extent it was "applicable and not inconsistent with" other federal law.

This case concerns the interpretation of the words "applicable and not inconsistent with" in OCSLA as it pertains to the interplay between California's Labor Code and the federal Fair Labor Standards Act of 1938 ("FLSA"). The court below applied the ordinary and plain meaning of those words. It held that California's Labor Code was "applicable" because it was relevant, suitable, and fit to be applied to employment matters on the OCS. It further opined that, because the federal FLSA minimum-wage and overtime laws explicitly provide only a floor and invite States to legislate more worker-friendly wage-and-hour measures, the incorporation of such state standards was "not inconsistent with" any federal law that governed OCS activities.

That holding is faithful to OCSLA and true to Congress's concern that the same law that applied onshore to a business also would be incorporated as federal law governing its offshore activities, when applicable and not inconsistent with federal standards. A company like petitioner, in other words, would not need to keep two sets of books for wages and hours depending on the exact moment the worker transitioned from shore to shelf. The power of plain language is such that petitioner grudgingly concedes

(at 22-23, 35) the Ninth Circuit's interpretation of "applicable and not inconsistent with" is "possible."

To fight OCSLA's plain language, petitioner's principal submission is that Congress meant something entirely different from the words it used: the word "applicable" really means "only when there is a gap in federal law." As a matter of ordinary meaning, petitioner's approach offers little to recommend it. Even worse, petitioner repeatedly invokes a purported background principle from the law of federal enclaves. Not only is petitioner incorrect about that principle, but applying petitioner's version actually would unsettle longstanding federal-enclave law and bring uncertainty to a rash of federal statutes and regulations that use the words "applicable" and "not inconsistent with." In practice, federal officers enforce state standards every day on federal enclaves, and statutes and regulations reflect all sorts of mechanisms for federal-state agreements to do just that. Indeed, OCSLA itself authorizes the Interior Secretary to override any state legal standards applicable on the OCS, but the Secretary simply has not chosen to exercise that power in this situation. Instead of upsetting a carefully balanced framework for the incorporation of state law in a manner that introduces great uncertainty in related areas, the Court should affirm the judgment.

STATEMENT

A. Statutory Background

1. Pre-OCSLA Drilling and Regulation on the Outer Continental Shelf

By 1896, onshore drilling operators realized California's oil fields extended offshore and drilled the first offshore oil well in the United States using wooden piers with derricks on top. Freestanding offshore-drilling platforms followed, and the offshore oil boom fully took off in 1947, when Kerr-McGee Corporation drilled a well 10 miles off the coast of Louisiana.[1]

At that time, coastal States had asserted ownership of submerged lands within their self-defined boundaries. Since 1849, California defined its seaward boundary as extending three English miles from its outermost islands. *See People v. Weeren*, 607 P.2d 1279, 1282 (Cal. 1980). Louisiana in 1938 and Texas in 1941 extended their boundaries 27 marine miles from the shore. *See United States v. Louisiana*, 339 U.S. 699, 703 (1950); *United States v. Texas*, 339 U.S. 707, 720 (1950). The federal government had not yet asserted any claims to the OCS, and the Department of Interior represented it lacked authority to issue mineral leases offshore. California, Texas, and Louisiana executed leases for drilling off their shores and collected "large sums of money in rents and royalties." *United States v. California*, 332 U.S. 19, 23 (1947); *see id.* at 38 (discussing 1921 California law permitting for oil and gas prospecting).

---

[1] *See generally* William L. Leffler, Richard Pattarozzi & Gordon Sterling, *Deepwater Petroleum Exploration & Production: A Nontechnical Guide* 1-8 (Tulsa, Okla.: PennWell Corp., 2003).

In 1945, President Truman issued a proclamation announcing that the "United States regards the natural resources of" the OCS "subject to its jurisdiction and control." Presidential Proclamation No. 2667, 10 Fed. Reg. 12,303 (Oct. 2, 1945). The proclamation was directed at the international community and "d[id] not touch upon the question of Federal versus State control." Presidential Press Release (Sept. 28, 1945).

Seeking the profits from offshore royalties, the federal government brought original actions for a declaration of federal ownership of offshore lands. *See California*, 332 U.S. at 22; *Louisiana*, 339 U.S. at 701; *Texas*, 339 U.S. at 709. In those cases, this Court held that the federal government had "paramount rights in and power over" the submerged lands and "full dominion" over their natural resources. *California*, 332 U.S. at 38-39; *see also Louisiana*, 339 U.S. at 704-06; *Texas*, 339 U.S. at 717-18. The Court also enjoined all offshore oil and gas operations. In response, the Interior Secretary authorized offshore wells already operating under state-issued leases to continue operations, but with all rents and royalties going to the Secretary. The authorization disclaimed that the federal government was adopting or ratifying those leases. *See* Notice, Oil and Gas Operations in the Submerged Coastal Lands of the Gulf of Mexico, 15 Fed. Reg. 8835 (Dec. 13, 1950); Notice, Oil and Gas Operations in Submerged Coastal Lands of Gulf of Mexico, 17 Fed. Reg. 5833 (June 28, 1952).

The Court's decisions surprised the coastal States, which had "claimed jurisdiction over the submerged lands and their rich oil, gas, and mineral deposits, and some had even extended their territorial boundaries as far as the outer edge of the OCS." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988) (citations

omitted). No federal law existed to issue new offshore leases, and new exploration and development ceased. Meanwhile, state-issued leases remained in limbo.

2. The Submerged Lands Act

In 1953, Congress responded to the outcry from coastal States following the Court's decisions in *California*, *Louisiana*, and *Texas* by promulgating the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* ("SLA"). That Act "extended the boundaries of Coastal States three geographic miles into the Atlantic and Pacific Oceans and three marine leagues into the Gulf of Mexico," and also confirmed the jurisdiction and control of the United States over natural resources seaward of state boundaries. *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 211-12 (2012).

3. OCSLA

In 1953, Congress also enacted OCSLA to supplement the SLA and to provide for federal administration over OCS mineral-resources development. 43 U.S.C. § 1331 *et seq.*[2] "In passing OCSLA, Congress intended to provide 'for the orderly development of offshore resources.'" *Shell Oil*, 488 U.S. at 27 (quoting *United States v. Maine*, 420 U.S. 515, 527 (1975)).

OCSLA extends federal law to the OCS, providing that "[t]he Constitution and laws and civil and political jurisdiction of the United States are extended to [offshore-drilling rigs] . . . to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1). As originally enacted, the choice-of-law provision adopted

---

[2] OCSLA defines the OCS as "the submerged lands subject to the jurisdiction and control of the United States lying seaward and outside of the submerged lands within the extended State boundaries." *Valladolid*, 565 U.S. at 212.

as federal law the then-existing civil and criminal laws of adjacent States that are "applicable and not inconsistent with" federal law:

> To the extent that they are *applicable and not inconsistent with* this [Act] or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, *the civil and criminal laws of each adjacent State as of the effective date of this Act are declared to be the law of the United States for that portion of the subsoil and seabed of the [OCS], and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward* to the outer margin of the [OCS], and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area.

Id. § 1333(a)(2) (1970) (emphases added). However, OCSLA expressly excluded the application of state-taxation laws to the OCS. *Id.* As the Court explained, "[t]he problem before Congress was to incorporate the civil and criminal laws of the adjacent States, and yet, at the same time, reflect the strong congressional decision against allowing the adjacent States a direct share in the revenues of the OCS, by making it clear that state taxation codes were not to be incorporated." *Shell Oil*, 488 U.S. at 27-28.

As the Court summarized, "[t]he intent behind OCSLA was to treat the artificial structures covered by the Act as upland islands or as federal enclaves within a landlocked State . . . for purposes of defining the applicable law." *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 217 (1986). Typically, state laws in existence at the time an enclave is created continue in force as federalized state law, *see James Stewart & Co.*

v. Sadrakula, 309 U.S. 94, 99 (1940), and are "applicable" so long as they do not "conflict[] [with] federal policy," *Paul v. United States*, 371 U.S. 245, 268-69 (1963). However, state laws enacted after the creation of a federal enclave are not applicable without approval by Congress. *Id.*

Arriving at OCSLA's governing-law provision presented a "challenging question" for its proponents. Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 37 (1953). That was because the individuals employed offshore "will die, leave wills, and pay taxes . . . . [T]he whole circle of legal problems familiar to the upland could occur on these structures." *Id.* In addition to deciding what law should apply, Congress had to decide who would administer and enforce the laws offshore.

Before settling on duel application of federal and state legal standards, Congress debated various other proposals. Members thought it was important that offshore workers benefit from the "social laws" of upland States, *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 361-62 (1969), because of "the close relationship between the workers on the [artificial] island[s] and the adjoining States," *id.* at 363.

After considering and rejecting proposals to extend state jurisdiction and state police powers to the OCS, Congress turned to the adjacent State's law to provide the content of federal law, "because men working on [the OCS] are closely tied to the adjacent State, to which they often commute and on which their families live." *Id.* at 355. Congress also recognized the "special relationship" between offshore workers and the laws of the adjacent State, "with which these men and their attorneys would be familiar." *Chevron Oil Co. v.*

Huson, 404 U.S. 97, 103 (1971), *disapproved of on other grounds by Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

Congress also considered existing state conservation laws and "the desirability of extending" them to the OCS. S. Rep. No. 83-411, at 3 (1953). The Senate Report discussed "the history of Federal conservation on areas of Federal jurisdiction within the borders of a State" as demonstrating "that the Federal Government has cooperated fully with State conservation authorities, and that the two systems can operate together." *Id.*

4. 1975 OCSLA Amendments

In 1975, Congress passed the Deepwater Port Act of 1974, Pub. L. No. 93-627, § 19(f), 88 Stat. 2126, 2146 (1975), which amended then § 1333(a)(2) of OCSLA.[3] When Congress originally enacted OCSLA, it was concerned that prospective incorporation of state law "now in effect or hereafter" could be an unconstitutional delegation of authority. *See* Christopher, 6 Stan. L. Rev. at 38-39. To avoid delegation problems, in 1953 Congress had adopted only the applicable and not inconsistent "laws of each adjacent State *as of the effective date of th[e] Act*." 43 U.S.C. § 1333(a)(2) (1970) (emphasis added); *see* 99 Cong. Rec. 6963-64 (1953) (statement of Sen. Cordon) ("The enactment as Federal law by reference of the laws of the several

---

[3] The Deepwater Port Act creates a regulatory regime for deepwater ports. 33 U.S.C. § 1501. The Senate Report noted that "deepwater port development will be regulated in the same manner as resource exploitation on the [OCS] . . . . State laws, to the extent they are not inconsistent with Federal law, are made applicable to deepwater ports." S. Rep. No. 93-1217, at 4 (1974), 1974 U.S.C.C.A.N. 7529, 7531-32.

abutting States meets the major constitutional objection, in that the laws so adopted are the laws as they exist at the time of the enactment of [OCSLA]. Only already existing State laws will become the law of the United States."). In other words, "applicable" state law was limited to state criminal and civil laws – except tax laws – in existence on OCSLA's effective date.

By 1975, the delegation concerns had been resolved by *United States v. Sharpnack*, 355 U.S. 286 (1958).[4] Congress therefore amended § 1333(a)(2) to provide that "the civil and criminal laws of each adjacent State, *now in effect or hereafter adopted, amended, or repealed* are declared to be the law of the United States." Pub. L. No. 93-627, § 19(f), 88 Stat. 2146, codified at 43 U.S.C. § 1333(a)(2) (1976) (emphasis added).

5. 1978 OCSLA Amendments

In 1969, a blowout at a Santa Barbara Channel offshore well caused 80,000 barrels of oil to spill into the ocean and onto California's beaches. Three more blowouts closely followed and prompted a reassessment of environmental and regulatory policy governing offshore drilling.[5]

Accordingly, in 1978, Congress amended OCSLA to include environmental-protection obligations and provisions for increased cooperation between the federal

---

[4] In *Sharpnack*, the Court upheld the Assimilative Crimes Act of 1948, which makes subsequently enacted state criminal laws "not made punishable by any enactment of Congress" enforceable on federal enclaves, ch. 645, § 13, 62 Stat. 683, 686, codified as amended at 18 U.S.C. § 13. *See* 355 U.S. at 292-94.

[5] For a history of the fallout from these blowouts, see generally Robert Easton, *Blacktide* (New York, N.Y.: Delacorte Press, 1972).

government and coastal States. *See* Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, 92 Stat. 629. The new "National Policy for the Outer Continental Shelf" declares the rights and responsibilities of States and local governments to protect "marine, human, and coastal environments," explaining that States' "regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized." 43 U.S.C. § 1332(5). "[H]uman environment" is defined as "the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the [OCS]." *Id.* § 1331(i).

As originally enacted, OCSLA authorizes the Interior Secretary to issue rules and regulations governing the OCS. *Id.* § 1334(a). In accordance with OCSLA's governing-law provision, these regulations nullify inconsistent state law. *Id.* § 1333(a)(2)(A). The 1978 amendments retain the Secretary's paramount regulatory authority, but also require the Secretary to cooperate with "affected States" to enforce "safety, environmental, and conservation laws and regulations." *Id.* § 1334(a). The Secretary gained authority to enter into cooperative agreements with affected States "to carry out applicable Federal and State laws, regulations, and stipulations relevant to [OCS] operations both onshore and offshore." *Id.* § 1345(e). The amendments also direct the Secretary to develop leasing programs in consultation with the affected coastal States. *Id.* And the 1978 amendments augmented authority Congress promulgated in the Coastal Zone Management Act of 1972, 16 U.S.C.

§ 1451 *et seq.* ("CZMA"), which requires certification that OCS activities will be conducted in a manner consistent with the adjacent State's coastal-management program. *Id.* § 1456(c)(3)(B). The 1978 OCSLA amendments direct the Secretary not to approve an exploration or development-and-production plan unless the adjacent State concurs with the consistency certification or the Secretary of Commerce overrides the state CZMA criteria. *See* 43 U.S.C. §§ 1340(c), 1351(d).

6. The Fair Labor Standards Act

The FLSA prohibits labor conditions "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The FLSA establishes "a few rudimentary standards," S. Rep. No. 75-884, at 3 (1937) (quoting Franklin D. Roosevelt's May 24, 1937 message to Congress), that serve as "a national *floor* under which wage protections cannot drop," *Pacific Merch. Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1425 (9th Cir. 1990). For example, the FLSA requires that employers pay a minimum hourly wage not less than the federal rate and overtime pay not less than the federal standard, 29 U.S.C. §§ 206-207, and requires employers to keep employee records, *id.* § 211(c).

The FLSA savings clause allows States and the federal government to set more favorable minimum-wage and maximum-hour requirements. The savings clause stipulates that the FLSA does not "excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher . . . or a maximum work week lower" than the FLSA. *Id.* § 218(a). Accordingly, when faced with differing state or federal laws, the savings clause establishes

that the greater minimum-wage or overtime protections apply. *See Powell v. United States Cartridge Co.*, 339 U.S. 497, 519-20 (1950).

On certain topics, the FLSA is silent as to appropriate worker protections. For example, the FLSA does not set standards for meal periods. The Department of Labor ("DOL") has instructed that, when States require meal periods, "[s]uch state requirements will prevail over the silence of the FLSA on this subject" because employees are entitled to the most beneficial provisions of each law. DOL, Employment Laws Assistance for Workers and Small Businesses, "Meal Period and Rest Breaks," https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEE4.asp (last visited Mar. 18, 2019).

7. The California Labor Code

California's Labor Code is designed to "promote[] and develop[] the welfare of the wage earners of California." Cal. Dep't of Indus. Relations, *The Laws Relating to the Time, Manner and Payment of Wages* 2 (Oct. 2013), https://www.dir.ca.gov/dlse/lawstimemannerpaymentwages.pdf. Enacted in 1937, the Labor Code regulates California wage-and-hour standards in tandem with the Industrial Welfare Commission's ("IWC") 17 wage orders. *See Mendoza v. Nordstrom, Inc.*, 393 P.3d 375, 379 (Cal. 2017) (explaining the complementary nature of California's Labor Code and wage orders).[6]

Five of respondent's claims arise under California's Labor Code: minimum-wage violations, Cal. Lab. Code §§ 1194, 1197; paystub violations, *id.* § 226; failure to timely pay wages at termination, *id.* §§ 201-202;

---

[6] Wage Order 16 applies to workers employed on-site in the drilling industry. *See* 8 Cal. Code Regs. § 11160.

failure to provide lawful meal periods, *id.* § 512; and failure to pay overtime and doubletime premium wages, *id.* § 510. All five claims are informed, in part, by the definition of "hours worked" in California Wage Order 16: "the time during which an employee is subject to the control of an employer, [including] all the time the employee is suffered or permitted to work, whether or not required to do so." 8 Cal. Code Regs. § 11160.2(J).[7]

B. Procedural History

1. Respondent Brian Newton was employed by petitioner on two OCS drilling platforms off California's coast from approximately January 2013 to January 2015. JA17.[8] Respondent was a resident of Ventura County, California, and traveled with other employees by boat to the platforms after attending mandatory safety meetings onshore. D.Ct. ECF #18-2, ¶¶ 11-12. Respondent worked in 14-day shifts, which consisted of 12 hours on duty and 12 hours of "controlled standby" each day. App. 3.[9] During the "controlled standby" periods, petitioner frequently required respondent to address problems as they arose, including combustible gas alarms or SO2 alarms, platform

---

[7] Respondent also alleges claims under California's Unfair Competition Law, which aims to curb unlawful business practices, including "failure to pay wages," *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 716 (Cal. 2000), and seeks relief under the Private Attorneys General Act of 2004, which allows recovery of civil penalties for violations of California's Labor Code, *see* Cal. Lab. Code § 2699(a).

[8] Drilling operations have ceased on the two platforms that employed respondent. Petitioner now uses only a three-person skeleton crew on these rigs. D.Ct. ECF #24, at 2-3.

[9] Work schedules like respondent's are used to keep onshore and offshore operations online at all times.

shutdowns, and mechanical failures. D.Ct. ECF #18-2, ¶ 15. Petitioner separately paid respondent for time spent transiting to and from the rig and for time spent actually responding to incidents that arose during controlled standby periods. App. 3.

Respondent alleges he was paid for only 12 hours of work a day and was not compensated for all the hours he was required to remain on the platform each day on "controlled standby." JA17. Respondent also alleges he was not provided off-duty meal periods. JA26-27.

2. In February 2015, respondent filed a putative class action against petitioner in California state court alleging violations of California's wage-and-hour laws. Petitioner removed the case and moved for judgment on the pleadings, contending that California law was not "applicable" under OCSLA. The district court adopted the Fifth Circuit's reasoning from *Continental Oil Co. v. London Steam-Ship Owners' Mutual Insurance Ass'n, Ltd.*, 417 F.2d 1030, 1036 (5th Cir. 1969), and held that OCSLA incorporates state law on the OCS only to the extent necessary "to fill a significant void or gap" in federal law. App. 51. The court determined that the FLSA's existence meant that California's wage-and-hour laws did not apply to the OCS and granted petitioner's motion. App. 50, 51-52.

3. The Ninth Circuit vacated the district court's order. The court interpreted "applicable" as "pertain[ing] to the subject matter at hand." App. 21. The court rejected the Fifth Circuit's approach, because the ordinary meaning of "applicable" "does not lend itself to the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." *Id.* The court concluded that nothing in the legislative history or this Court's precedent mandated

"judicial substitution of 'necessary' for the actual statutory term, 'applicable.'" App. 22-23. California's laws thus were applicable in the ordinary sense.

The court then concluded that California's laws were "not inconsistent with" existing federal law, holding that laws are "inconsistent if they are mutually incompatible, incongruous, or inharmonious." App. 28 (brackets omitted). In reviewing federal-enclave law and other federal statutes, the court found that "inconsistency between state and federal law is assessed by looking at Congress's objective in enacting the federal statutes at issue." App. 35. Noting as "critical" that the FLSA "establishes a national *floor* under which wage protections cannot drop," and that the savings clause "expressly provides that states are free to adopt more protective standards," the court held that the FLSA explicitly permits the application of California's more protective wage-and-hours laws. App. 36 (brackets omitted). The court found this interpretation consistent with OCSLA's purpose, which "rejected national uniformity" in favor of "application of state law with which [OCS workers commuting from the adjacent shore] and their attorneys would be familiar." App. 37-38.[10]

---

[10] The Ninth Circuit amended its opinion to reserve for the district court's consideration whether the holding should be applied retrospectively. App. 43.

SUMMARY OF ARGUMENT

I. OCSLA provides that "applicable and not inconsistent" state law is adopted on the OCS as federalized state law. 43 U.S.C. § 1333(a)(2)(A).

A. Under the ordinary meaning of "applicable," state legal standards are incorporated into federal law on the OCS when they are relevant, suitable, or fit. State standards capable of being applied on the OCS – such as wage-and-hour laws – are applicable; but state rules having no relevance on the OCS – such as motor-vehicle lemon laws – are not. The rest of the statutory scheme reinforces that interpretation. It excludes the application of state-taxation laws – an unnecessary provision if Congress had intended "applicable" to be more limited than its ordinary meaning. OCSLA also affirms the coastal States' rights and responsibilities over the onshore and offshore environment, a condition satisfied only by a cohesive shore-to-shelf legal regime. 43 U.S.C. § 1332(5). The word "applicable" appears throughout OCSLA, and, by using its ordinary meaning, "applicable" carries the same meaning throughout the statute. Finally, in numerous cases discussing OCSLA, this Court has used "applicable" in its ordinary meaning, and the Court should continue to do so here.

B. Under the plain meaning of "not inconsistent," state legal standards that are not "incompatible" with or "contradictory" to federal law are adopted as federalized state law on the OCS. Whether a state legal standard is not inconsistent with federal laws requires considering the content of potentially applicable regimes and determining whether the two are incompatible.

II.A. California's wage-and-hour laws are applicable to respondent's claims regarding his OCS employment, because respondent was employed on drilling

rigs off California's coast and these laws are relevant and capable of being applied on the OCS.

B. California's wage-and-hour laws also are not inconsistent with federal law. The FLSA sets a federal floor, beneath which wage-and-hour protections cannot drop. 29 U.S.C. §§ 206-207. The FLSA's savings clause provides that, when federal, state, or local laws set higher minimum-wage or maximum-workweek requirements, those higher standards shall be enforced. *Id.* § 218(a). California's more protective standards – which exceed the FLSA's floor and are consistent with its remedial purpose of ensuring worker well-being – logically cannot be inconsistent with the FLSA. When faced with two different wage-and-hour standards, the Court has interpreted the FLSA to require application of the higher standard. *See Powell*, 339 U.S. at 519-20. This case is no different.

III. Contrary to petitioner's argument, OCSLA's plain language contains no requirement that there first be a gap or void in federal law before state legal standards become "applicable." Petitioner instead asks the Court to believe that Congress did not intend the ordinary meaning of "applicable" but instead wanted courts to look outside the statute's plain text to derive its meaning.

A. Regardless of how many times petitioner repeats its mantra, the fact that "all law on the OCS is federal law" does not require altering the text to limit the role of state law to a gap-filling role. Rather than gathering clues from petitioner's articulation of Congress's preferences, purported background principles of law, and other subsections of OCSLA to divine congressional intent, the Court can apply established rules of statutory interpretation and give

the text its ordinary meaning. Congress knows how to limit the application of state legal standards to only fill gaps in federal law and has legislated accordingly when that was its intent. Beyond OCSLA, Congress and federal agencies frequently use "applicable" to outline what laws are to be used. Interpreting "applicable" as "necessary" would unnecessarily complicate provisions throughout the U.S. Code and the Code of Federal Regulations ("C.F.R."). For example, DOL's regulations provide that "applicable" federal, state, or local wage-and-hour laws are not displaced by the FLSA. Petitioner's interpretation of "applicable" as necessary to fill a gap would mean that no federal, state, and local wage-and-hour laws would ever apply, because the FLSA is a comprehensive scheme.

Petitioner and the government rely on federal-enclave law to provide context to OCSLA's text. However, what law applies on a federal enclave varies enclave by enclave. Each enclave raises its own question of congressional intent from the statute that creates it. Accordingly, OCSLA's text should control over generic federal-enclave principles. Contrary to petitioner's argument, state law does far more than just "fill gaps" on federal enclaves. This Court has recognized that state laws existing at the time of cession that are not inconsistent with federal law generally became federalized state law; however, state laws enacted after the cession do not. OCSLA tracks federal-enclave principles by making the not-inconsistent laws of adjacent States applicable to the OCS as federalized state law. And, consistent with the rule that Congress can alter background presumptions on federal enclaves, in OCSLA amendments Congress provided that state laws enacted after its passage also would apply on the OCS.

Petitioner unnecessarily blurs the distinctions between "jurisdiction," "administration and enforcement," and "applicable" law. There is no irregularity with a system that incorporates not-inconsistent state legal standards as federal law, to be administered and enforced by the federal government in an area of federal jurisdiction. Significantly, the Interior Secretary can issue rules and regulations governing the OCS that displace inconsistent state legal standards, but has not done so here.

Petitioner's reliance on snippets of legislative history to create ambiguity in the plain statutory text should be disregarded. The Court has recognized that Congress's desire to protect the "special relationship" between workers on the shelf and their life on the shore led to the application of "law with which these men and their attorneys would be familiar." *Huson*, 404 U.S. at 103. Accordingly, "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Id.* at 104.

B. The fact that the FLSA sets only minimum standards and has a savings clause preserving differing legal standards should leave no doubt that state laws setting more generous standards are consistent with federal law.

Petitioner places much weight on California's laws being "different" from federal laws. But the plain meaning of "not inconsistent" does not mean "not different." The FLSA does not set a ceiling, so California's higher minimum wage cannot be inconsistent with federal standards. As this Court explained in *Powell*, two different minimum-wage regimes are not "mutually exclusive," 339 U.S. at 519-20, as Congress provided through the FLSA's savings clause that the more generous law should apply.

The fact that OCSLA applies state legal standards as federal law on the OCS is no reason to depart from the ordinary meaning of "not inconsistent." The government encounters different federal minimum wages onshore and has no issues applying both.

IV.A. Applying the same legal standards onshore and offshore ensures the closely interconnected offshore-drilling and onshore-processing facilities can synchronize operations. Consistent wage-and-hour laws allow workers on both ends of the pipeline to maintain the same schedules, which enhances operational safety. The system also makes bookkeeping easier, as employers do not need to separately track the hours of employees who move between different legal regimes. Employees also benefit from consistent laws, regardless of how their working hours are split between the shore and the shelf.

B. Local uniformity also has been established in national parks and forests, where "applicable" state and federal laws are enforced by federal officials. Recreational hunters and fishers benefit from the same legal standards on state and federal land. Reinterpreting "applicable" to mean "necessary" would create confusion over what laws actually "apply" to any given activity in a national park. The simplicity petitioner claims to seek for oil and gas operators would complicate the legal regime on federal enclaves.

C. Petitioner's fear of applying different laws off California's coastline versus Louisiana's coastline does not mandate departing from OCSLA's plain text. The Court already has noted that Congress rejected national uniformity as a goal of OCSLA. *See Huson*, 404 U.S. at 104.

Contrary to petitioner's contention of abnormality, federal officials often enforce state laws and regulations. In national parks, federal officials enforce state criminal, civil, and regulatory laws. On the OCS, the Interior Secretary has statutory authority to relieve burdens on federal enforcement and can issue regulations to displace state legal standards or delegate enforcement authority to the States.

Many operators off California's shores already apply California wage-and-hour laws in their collective-bargaining agreements and employment agreements. Petitioner's desire to avoid state standards does not justify an unsound statutory interpretation.

ARGUMENT

I. STATE LAW APPLIES ON THE OCS IF IT IS "APPLICABLE" AND "NOT INCONSISTENT" WITH FEDERAL LAW

A. Under The Ordinary Meaning Of "Applicable," State Legal Standards Apply On The OCS If They Are Relevant, Suitable, Or Fit

1. Statutory interpretation "begins with the plain language of the statute." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). If that "language provides a clear answer, [interpretation] ends there as well." *Harris Tr. & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 254 (2000).

"Applicable" is not defined in OCSLA, so it should be given its ordinary meaning. *See Artis v. District of Columbia*, 138 S. Ct. 594, 603 (2018). The ordinary definition of "applicable" is "[c]apable of being applied; fit to be applied; having relevance." *Webster's Universal Dictionary* 131 (1953) ("*Webster's*"); *see also Black's Law Dictionary* 127 (4th ed. 1951) ("*Black's*") ("[f]it, suitable, pertinent, or appropriate"). Given the ordinary, natural meaning of "applicable," state civil

and criminal laws are adopted as federal law on the OCS when they are relevant, suitable, or fit – in other words, when they pertain to the subject matter at hand. "Applicable" necessarily includes on-point state law that supplements and overlaps with federal law. In ordinary parlance, two different laws are both "applicable" if they address the same topic.

2. Applicable state law includes non-tax state laws "now in effect or hereafter adopted, amended, or repealed" that are capable of being applied, relevant, suitable, or fit to the subject matter at hand. 43 U.S.C. § 1333(a)(2)(A). Not all adjacent-state laws, however, are "[c]apable of being applied" or "hav[e] relevance" on the OCS. *E.g.*, 8 Cal. Code Regs. § 11140 (setting wage-and-hour laws for agricultural occupations); Cal. Fish & Game Code § 3961 (hunting dogs may be "lawfully seized" for "inflicting injury or immediately threatening to inflict injury to any deer, elk, or pronghorned antelope"); La. Stat. § 51:1941 *et seq.* (lemon laws for motor vehicles); Tex. Gov't Code § 3101.010 ("caus[ing] pecans to fall from a pecan tree by any means, including by thrashing," on government land, criminalized without written consent).

3. Reading "applicable" as pertaining to the subject at issue is consistent with OCSLA's statutory scheme and purpose.

Section 1333(a)(2)(A), for example, provides that "State taxation laws shall not apply to the [OCS]." Under the ordinary meaning of "applicable," state tax laws would apply to the OCS because they are pertinent to the subject matter. However, if Congress had intended a silent requirement of a gap in federal law before state law is "applicable," it would have been superfluous for Congress also to specify that state-taxation laws do not apply on the OCS. There would have been no void or gap for state law to fill because

federal-taxation laws existed for decades prior to OCSLA's enactment.

Other OCSLA provisions confirm the plain meaning of "applicable." The "National Policy for the Outer Continental Shelf," incorporated into OCSLA in 1978, recognizes the connection between adjacent States and offshore activities. The policy affirmed "the rights and responsibilities of all States . . . to preserve and protect their . . . human . . . environments through . . . regulation." 43 U.S.C. § 1332(5). Congress defined "human environment" to include "the physical, social, and economic components, conditions, and factors which interactively determine the . . . *employment* . . . of those affected, directly or indirectly, by activities occurring on the [OCS]." *Id.* § 1331(i) (emphasis added). That purpose is best achieved by interpreting "applicable" in accordance with its plain meaning, so that state laws protecting the "marine, human, and coastal environments" apply to the OCS just as they do in the uplands.

Congress used "applicable" in numerous other OCSLA provisions. The only way to give "applicable" a consistent and coherent meaning throughout the text is to use its ordinary meaning. *See Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[I]dentical words used in different parts of the same statute carry the same meaning."). For example, OCSLA provides that all "*applicable* laws" on the OCS are "administered and enforced by the appropriate officers and courts of the United States." 43 U.S.C. § 1333(a)(2)(A) (emphasis added). The Interior Secretary is authorized to enter into cooperative agreements with States to form "joint surveillance and monitoring arrangements to carry out *applicable* Federal and State laws." *Id.* § 1345(e) (emphasis added). States must use royalties received under the Act

"in accordance with all *applicable* Federal and State laws." *Id.* § 1356a(d)(1) (emphasis added). In each instance, "applicable" refers to laws that are relevant, suitable, or fit to the OCS. Interpreting "applicable" as requiring only gap filling in § 1333(a)(2)(A) would violate every normal canon of statutory construction.

4. The Court has not yet interpreted the meaning of "applicable" state law in OCSLA's governing-law provision. However, the Court repeatedly has decided cases where the ordinary meaning of "applicable" provides the necessary context.

a. In *Rodrigue*, the survivors of two platform workers brought wrongful-death claims under both the Death on the High Seas Act ("DOHSA") and Louisiana law. 395 U.S. at 353-54. The Court considered whether DOHSA, a maritime law, applied of its own force or whether state law, made applicable through OCSLA, supplied the appropriate remedy.[11] The Court held OCSLA's text and legislative history made clear that admiralty law does not apply on the OCS, and the federal action under DOHSA was "no more appli[cable] to these accidents actually occurring on [fixed drilling platforms] than it would [be] to accidents occurring in an upland federal enclave." *Id.* at 366. Thus, Louisiana law applied as federal law, federally enforced.

In reaching that conclusion, the Court did not need to address the meaning of "applicable" when both state and federal law provided a remedy, because federal law was deemed unsuited to the issue.

---

[11] The question before the Court was not whether federal law as defined in § 1333(a)(1) applied on the OCS and whether state law also was applicable pursuant to § 1333(a)(2)(A). Rather, the question was whether DOHSA, a federal statute that left no room for application of any other federal or state law, was the only law that applied. *See* 395 U.S. at 359.

The only law left to apply after excluding DOHSA was Louisiana law. However, the Court considered OCSLA's governing-law provision more generally and declared that OCSLA "makes it clear that federal law, supplemented by state law of the adjacent State, is to be applied to these artificial islands as though they were federal enclaves in an upland State." *Id.* at 355. In other words, the law on the OCS "was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law." *Id.* at 355-56. A "theme" running through the OCSLA hearings "was the close relationship between the workers on the island and the adjoining States." *Id.* at 363.[12] This theme underscores Congress's intent for "applicable" to carry its ordinary meaning, so that the familiar legal standards of the adjacent State are adopted on the OCS.

b. Two years later, the Court again considered OCSLA's governing-law provision in a manner that reinforced the plain meaning of "applicable." In *Huson*, the Court addressed whether a personal-injury claim was time-barred under Louisiana law, as incorporated into federal law through OCSLA, or whether the federal admiralty doctrine of laches applied. 404 U.S. at 98-99. The Court held that the

---

[12] Petitioner argues (at 26) that the Court "repeatedly emphasized that state law applied only to fill federal voids." What the Court actually stated was that "state law *could* be used to fill federal voids," not that state law applies *only* when there is such a void. *Rodrigue*, 395 U.S. at 358 (emphasis added). Regardless, such asides were dicta, because the Court did not consider how state law would apply if there were also applicable federal law. As the government recognizes (at 18 n.5), *Rodrigue* can be read to support respondent's position. Any ambiguous dicta in *Rodrigue* should not distract from OCSLA's text, which confirms that relevant state legal standards apply on the OCS when not inconsistent with federal law. *See* 43 U.S.C. § 1333(a)(2)(A).

laches doctrine did not apply because Congress did not intend admiralty law to apply as federal common law on the OCS. *Id.* at 103-04. Rather, the state statute was "'applicable' in federal court under [OCSLA] just as it would be applicable in a Louisiana court." *Id.* at 103. The Court did not define "applicable" but gave the word its ordinary meaning, concluding that state law "applicable" in Louisiana courts also is "applicable" on the OCS.

The Court was not confronted with potentially applicable federal and state laws. Nonetheless, the Court explained, "[t]o the extent that a comprehensive body of federal law is applicable under § 1333(a)(1), state law 'inconsistent' with that law would be inapplicable under § 1333(a)(2)." *Id.* at 100-01. The Court also observed that "[a] primary purpose underlying the absorption of state law as federal law in [OCSLA] was to aid injured employees by affording them comprehensive and familiar remedies." *Id.* at 107-08. Giving "applicable" its plain meaning reinforces that goal.

c. In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981), the Court considered seemingly conflicting state and federal common-law jury instructions regarding personal-injury damages: "Our first task is to determine the source of law that will govern . . . . In any particular case, the adjacent State's law applies to those areas 'which would be within the area of the State if its boundaries were extended seaward to the outer margin of the [OCS].'" *Id.* at 485-86 (quoting 43 U.S.C. § 1333(a)(2)(A)). Again, the Court used "applicable" to refer to relevant state law, noting that Congress "incorporated . . . the applicable law of Louisiana, but only to the extent it is not inconsistent with federal law. . . . Congress borrowed a remedy provided by state law and thereby specifically rejected

national uniformity as a paramount goal." *Id.* at 487 (brackets omitted); *see also id.* at 489 (Blackmun, J., concurring in part and concurring in the result) ("[T]he purpose of incorporating state law was to permit actions arising on these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result . . . ."). Notably, the Court did not consider Louisiana's jury instruction not "applicable" merely because a federal jury instruction addressed personal-injury damages.

B. Under The Ordinary Meaning Of "Not Inconsistent," State Law That Is Not Incompatible With Or Not Contradictory To Federal Law Applies On The OCS

The plain meaning of "inconsistent" is "incompatible" or "contradictory." *Webster's* at 1259; *see also Black's* at 907 ("[m]utually repugnant or contradictory"). Pursuant to the ordinary, natural meaning of the phrase "not inconsistent," state laws that are not incompatible with or contradictory to federal laws are adopted as federal law on the OCS. Thus, even when the laws embrace overlapping subjects, OCSLA adopts state rules as federal law, so long as those rules are not incompatible with federal law.

In *Gulf Offshore*, the Court laid out a framework for determining if a state law is inconsistent with federal law. The Court explained that "[t]o apply the statutory directive a court must consider the content of both potentially applicable federal and state law." 453 U.S. at 486. The Court then remanded to the state court to determine if the state and federal jury instructions were inconsistent. *Id.* at 488.

That conceptual approach was not new. In *Franklin v. Lynch*, 233 U.S. 269 (1914), the Court considered

the application of state and federal laws regarding land conveyances in Indian Territory. Congress declared the laws of Arkansas, to the extent they were "'applicable and not inconsistent with any law of Congress,'" were adopted as the laws of that territory. *Id.* at 273 (quoting Act of Feb. 19, 1903, ch. 707, 32 Stat. 841, 841-42). At issue was a federal law prohibiting the sale by Native Americans of any lands issued to them by a land patent and an Arkansas law that would have allowed the conveyance in question. *Id.* at 270-71. The Court noted that the Arkansas law was extended to the territory, but "[i]t has no effect here because it is inconsistent with the act of [Congress]." *Id.* at 273; *see also Adkins v. Arnold*, 235 U.S. 417, 421 (1914) ("Congress intended [Arkansas law] should have the same force and meaning [in the territory] that [it] had in Arkansas."). As with the framework in *Gulf Oil*, the Court considered the content of both potentially applicable federal and state laws to determine if there was a conflict or incompatibility between the two.

II. CALIFORNIA'S WAGE-AND-HOUR LAWS ARE RELEVANT AND NOT INCOMPATIBLE WITH THE FLSA

A. California's Wage-And-Hour Laws Are "Applicable" Because They Are Relevant To The Pertinent Subject Matter

California law applies to the drilling rigs on the Santa Barbara Channel where respondent worked because the drilling rigs "would be within the area of [California] if its boundaries were extended seaward." 43 U.S.C. § 1333(a)(2)(A). California has applied its state wage-and-hour laws offshore, and thus California's wage-and-hour laws are "[c]apable of being applied" on the OCS. *Webster's* at 131; *see Aubry*, 918 F.2d at 1420 (holding California wage-and-

hour laws apply in the Santa Barbara Channel); *Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 297-302 (Cal. 1996) (holding California Labor Code applies to federal waters).

B. California's Wage-And-Hour Laws Are "Not Inconsistent" With Federal Law Because Both The FLSA And OCSLA Contemplate Application Of More Protective State Labor Laws

1. The FLSA imposes federal minimum-wage and hour protections on employers. The minimum wage must be "*not less than*" the federal minimum, 29 U.S.C. § 206(a)(1) (emphasis added), and the rate of overtime pay must be "*not less than* one and one-half times the regular rate" an employee receives, *id.* § 207(a) (emphasis added). These standards are a floor below which worker protections may not drop. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (FLSA "seeks to prohibit 'labor conditions detrimental to the maintenance of [a] minimum standard of living'") (quoting 29 U.S.C. § 202(a)); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (FLSA "was designed to give specific minimum protections to individual workers") (emphasis omitted). The purpose of setting that floor was "not to establish absolute uniformity in minimum wage and overtime standards nationwide at levels established in the FLSA." *Aubry*, 918 F.2d at 1425. Instead, the FLSA contemplates employees benefiting from more protective state wage-and-hour laws, when they exist.

To avoid any doubt over which wage-and-hour laws should apply in the face of parallel regimes, the FLSA's savings clause directs that the higher standard will apply. *See* 29 U.S.C. § 218(a) ("No provision of this chapter . . . shall excuse noncompliance with

any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter . . . .").

DOL regulations support the States' ability to adopt more protective standards, which the FLSA does not "override or nullify." For example, the regulations governing minimum-wage and overtime compensation create room for state standards to apply. *See* 29 C.F.R. § 778.5 ("Various Federal, State, and local laws require the payment of minimum . . . wages different from the minimum set forth in the [FLSA], and the payment of overtime compensation computed on bases different from those set forth in the [FLSA]. Where such legislation is applicable and does not contravene the requirements of the [FLSA], nothing in the act, the regulations or the interpretations announced by the Administrator should be taken to override or nullify the provisions of these laws."); *see also id.* § 531.26 (adopting same provision for how wages must be calculated and paid).

In a recent opinion, DOL interpreted opposing state and federal laws regarding payment of subminimum wages to workers with disabilities. DOL instructed that the more generous state-law provisions should apply – even when employers receive federal waivers excusing compliance with the federal standards – because "[b]oth the FLSA and the corresponding regulations allow states to establish a higher minimum wage rate than the rate set by the FLSA."[13]

---

[13] Administrator's Interpretation No. 2016-2, "Effect of state laws prohibiting the payment of subminimum wages to workers with disabilities on the enforcement of section 14(c) of the Fair Labor Standards Act" (Nov. 17, 2016), https://www.dol.gov/whd/opinion/AdminIntrprtn/FLSA/2016/FLSAAI2016_2.pdf.

Accordingly, the FLSA contemplates, and allows for, the coexistence of more protective minimum-wage and maximum-work-week provisions.

2. California's minimum-wage laws are not "incompatible" with the FLSA. Because Congress enacted the FLSA as a floor, and California's wage-and-hour laws are "not less than" that floor, California laws are not inconsistent with the FLSA. *Compare* 29 U.S.C. § 206(a) (setting hourly federal minimum wage of $7.25) *with* Cal. Lab. Code § 1182.12(b)(1)(C) (setting hourly California minimum wage of $12). The savings clause allows California to provide greater minimum-wage protections and resolves any doubt regarding how to reconcile the two different minimum wages: the employer must pay the higher amount. *See* 29 U.S.C. § 218(a). The same analysis applies to respondent's overtime claim, which relies on California laws that permissibly set standards above the federal floor. The FLSA savings clause directs petitioner to pay wages according to the more generous provision.

3. The Court's interpretation of the FLSA savings clause in *Powell* establishes that California's wage-and-hour laws are not inconsistent with the FLSA. There, the Court addressed the application of two federal wage-and-hour laws. The Walsh-Healey Act establishes a higher minimum wage for federal contractors than the FLSA; however, the FLSA contains more generous remedial provisions than the Walsh-Healey Act. The Court held these two statutes are not "mutually exclusive," as compliance with one does not make it impossible to comply with the other. 339 U.S. at 519-20. In fact, the Court determined that the FLSA savings clause indicates "congressional awareness" of potentially overlapping labor standards. *Id.* at 518. The Court deemed the two statutes "mutually

supplementary" and reconcilable by determining "the respective wage requirements under each Act and then applying the higher requirement as satisfying both." *Id.* at 519-20.

4. Applying California's more protective state legal standards also is thoroughly *consistent* with the FLSA's policy goals. The FLSA was enacted "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine*, 450 U.S. at 739 (citing 29 U.S.C. § 202(a)). The FLSA was "'not designed to codify or perpetuate industry customs and contracts,'" but instead to achieve a minimum level of compensation for all employee work. *Id.* at 741 (quoting *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 602 (1944)) (brackets omitted). California's laws accord with the FLSA's remedial purpose of protecting workers with a federal floor from which States can enact more favorable protections.

Applying California's more protective state legal standards also is consistent with OCSLA's purposes. In *Valladolid*, the Court recognized not only that offshore platforms are physically connected to onshore-processing facilities via oil and gas pipelines, but also that employees move between the platforms and the shore during their employment. 565 U.S. at 215. Congress, and this Court, emphasized that the special relationship between offshore workers and the adjacent State where they live "favored application of state law with which these men and their attorneys would be familiar." *Huson*, 404 U.S. at 103. In incorporating state legal standards into federal law on the OCS, Congress "specifically rejected national uniformity as a paramount goal." *Gulf Offshore*, 453 U.S. at 487. Congress also emphasized the rights and responsibilities of all States "to preserve and protect their . . .

human . . . environments," 43 U.S.C. § 1332(5), which it defined to include "the state, condition, and quality of . . . employment" on the OCS, *id.* § 1331(i). Those rights and responsibilities include wage-and-hour laws, and California's laws fulfill that objective without creating inconsistencies with federal law.

III. PETITIONER'S ARGUMENTS LACK MERIT

A. Accepted Principles Of Statutory Interpretation Preclude Petitioner's Reading Of "Applicable"

Lacking a definition to support its interpretation of "applicable," petitioner instead suggests that Congress hid the true meaning of "applicable" in the legislative history and surrounding portions of the statute, rather than just relying on the word's plain meaning. Petitioner concedes (at 16, 35) the Ninth Circuit's definition of "applicable" "is certainly one of the possible meanings of that word," but nonetheless urges this Court to abandon established principles of statutory interpretation in favor of first considering "Congress' primary judgment" in enacting OCSLA and then reading OCSLA's text "in light of" that judgment. Petitioner's arguments lack merit.

1. The statutory text lends no support to petitioner's contention that "applicable" should be interpreted to require a gap in federal law before state law applies

Dodging the plain meaning of "applicable," petitioner creates a two-part mantra for how it wishes OCSLA's governing provision to work. Petitioner hopes that the Court will be persuaded to combine an undisputed proposition with one that is textually insupportable: "First, all law on the OCS is federal law. . . . Second, the role of state law is limited to a gap-filling role." Pet. Br. 22. The first point is undisputed – and beside

the point. Section 1333(a)(1) extends "[t]he Constitution and laws . . . of the United States" to the OCS, and § 1333(a)(2)(A) declares "applicable and not inconsistent" state law "to be the law of the United States" on the OCS. The fact that the law is "federal," however, says nothing about whether the content of that law derives from state standards.

Petitioner's trick move lies in the second step, because it is not supported by the statute's text. Rather, petitioner bases the assertion on a combination of three factors that do not address when state legal standards are "applicable" to the OCS: (1) Congress's preference for federal law, which petitioner decrees is "[t]he most basic judgment" Congress made in enacting OCSLA; (2) background principles relating to federal-enclave law; and (3) the "reinforcing provisions" of other subsections of § 1333, which provide for federal administration of laws on the OCS and disclaim "any interest in or jurisdiction on behalf of any State" over the OCS. Pet. Br. 19-23. These considerations, however, do not actually support petitioner's preferred outcome that "state law is only 'applicable' to the OCS when there is a gap that needs to be filled." *Id.* at 23. As the Ninth Circuit correctly held in rejecting petitioner's arguments, nothing in "the ordinary, contemporary, common meaning of 'applicable' . . . lend[s] itself to the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." App. 21 (citation omitted).

a. Petitioner's interpretation would require a judicial rewriting of the statute to say that state laws apply "to the extent that they are applicable *because there is a significant void or gap in federal law* and not inconsistent . . . ." Had Congress intended to use "applicable" to imply gap filling, it would have said so using plain language.

Indeed, when Congress intends for state laws to serve merely a gap-filling role, it says so. For example, the Assimilated Crimes Act ("ACA") applies state criminal law to federal enclaves only when an act or omission is not already made punishable "by any enactment of Congress." 18 U.S.C. § 13(a); *see also Lewis v. United States*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law."). And the Civil Rights Attorney's Fees Awards Act of 1976 authorizes courts to borrow state common law where "the laws of the United States . . . are not adapted to the object [of the applicable federal statutes], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." 42 U.S.C. § 1988(a).[14]

b. Petitioner's outcome-determinative approach to the phrase "applicable and not inconsistent" creates a potentially destabilizing effect on other statutes and regulations that use the same language. For example, under DOL regulations governing the FLSA, *see supra* p. 36, when a federal, state, or local law providing different minimum wages or methods for computing overtime compensation is "*applicable and does not contravene* the requirements of the [FLSA]," the FLSA does not "override or nullify the provisions of th[o]se laws." 29 C.F.R. § 778.5 (emphasis added). Under the ordinary meaning of "applicable" (relevant, suitable, fit), this regulation "saves" more protective state

---

[14] The government argues (at 13) that Congress's "practice of making state criminal law 'applicable on federal enclaves' only to 'fill gaps' in federal law[] strongly indicates" that OCSLA also makes state law applicable on the OCS only to fill gaps. What the ACA actually evinces is that, when Congress wants state law only to fill gaps, it legislates accordingly.

wage-and-hour laws that pertain to the subject matter at hand. Under petitioner's interpretation of "applicable" ("necessary to fill a significant void or gap," Pet. Br. 26), however, none of the more protective federal, state, and local laws would ever apply, because, as petitioner asserts, the FLSA leaves no such gap.

c. The Court's holding in *Ransom v. FIA Card Services, N.A.*, 562 U.S. 61 (2011), does not support petitioner's interpretation. In *Ransom*, the Court interpreted "applicable monthly expense amounts" – undefined in the Bankruptcy Code – by looking "to the ordinary meaning" of "applicable." *Id.* at 69. Relying on the dictionary definition, the Court concluded a monthly expense amount is "applicable" when it is "appropriate, relevant, suitable, or fit." *Id.* The Court determined that "applicable" established a "filter" so that a debtor could take deductions only appropriate to her individual financial circumstances. *Id.* at 69-70. Contrary to petitioner's contention, the Court did not use "context" or "purpose" to depart from the ordinary meaning of the statute, Pet. Br. 36, but merely to "support" and "strengthen[]" the conclusion reached from the plain meaning, 562 U.S. at 70-71.

The Court's interpretation of "applicable" in *Ransom* and the Ninth Circuit's interpretation of "applicable" here are on all fours. The ordinary meaning of "applicable," as used in OCSLA, conveys that a state law is applicable when "appropriate, relevant, suitable, or fit." *See id.* at 69. In other words, a state law is applicable on the OCS if the drilling rig is within the area of the State if its boundaries were extended seaward and the law at issue is relevant or suitable to the legal issue at hand. "Applicable," therefore, also serves as a "filter" in OCSLA, weeding out both the laws of non-adjacent States and the legal

standards of the adjacent State that are unsuitable to circumstances on the OCS. *See, e.g.*, Cal. Fish & Game Code § 3961 (hunting dogs may be "lawfully seized" for "inflicting injury or immediately threatening to inflict injury to any deer, elk, or prong-horned antelope").

d. Finally, petitioner's interpretation of "applicable" as "necessary" (at 26) renders superfluous the term "not inconsistent." Under petitioner's interpretation, state law "applies" on the OCS only when "necessary to fill a significant void or gap in federal law." *Id.* (brackets omitted). But, on that reading, if state law is applicable, there is no federal law addressing a particular topic and therefore no federal law for state law to be "inconsistent with." *See, e.g.*, *Huson*, 404 U.S. at 101 ("[T]here exists a substantial 'gap' in federal law. Thus, state law remedies are not 'inconsistent' with applicable federal law."). Petitioner (at 41 n.8) and the government (at 25) recognize this flaw in their argument, but neither can articulate a scenario where a state law can be "applicable," because there is a gap in federal law, and yet "inconsistent with" federal law. To accept petitioner's interpretation of "applicable" as "necessary" would make "not inconsistent" superfluous and, therefore, violate the "cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000).

2. Petitioner misunderstands how law applies on federal enclaves

a. Petitioner and the government argue relevant context can be gleaned from OCSLA's provision extending federal law to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal

jurisdiction located within a State." Pet. Br. 20, 35; U.S. Br. 12-14. Federal-enclave law parallels some of OCSLA's provisions. But both briefs incorrectly claim that state law applies on federal enclaves "only if there is a gap in federal law," and therefore conclude that state law also must apply on the OCS only to fill gaps in federal law. Pet. Br. 20; U.S. Br. 13-14. That argument raises four problems.

First, it is impossible to generalize one rule for how laws apply on federal enclaves. What law applies to a federal enclave stems from the agreement reached between a State and the federal government when a particular enclave is ceded. *See Sadrakula*, 309 U.S. at 99-100 ("It is now settled that the jurisdiction acquired from a state by the United States . . . may be qualified in accordance with agreements reached by the respective governments."). Generalizations about enclaves are even less useful on the OCS, as Congress's text is what controls. There is no governing agreement between the adjacent States and the federal government. Instead, OCSLA dictates what state legal standards apply on the OCS. Even assuming Congress drew on federal-enclave principles in enacting OCSLA, the absence of a uniform enclave doctrine for determining when state law applies means that OCSLA's clear statutory text remains the starting point for interpreting its governing-law provision.

Second, the principles of law the Court has recognized as consistent across enclaves refute the argument that state law only "fills gaps" on federal enclaves. Rather, when a new federal enclave is established, state laws "existing at the time of the surrender of sovereignty," *id.*, and "not inconsistent with federal policy," *United States v. State Tax*

Comm'n of Mississippi, 412 U.S. 363, 369 (1973), continue in force until altered by Congress, *id.*; *see also Sadrakula*, 309 U.S. at 97-98 (holding existing New York labor law to be "applicable" after federal government acquired exclusive federal jurisdiction). When the federal government has exclusive jurisdiction over a federal enclave, state law existing at the time of cessation becomes federalized state law. *See Sadrakula*, 309 U.S. at 97-98 (explaining that New York labor law "remains effective as a statute of the United States"). Notably, on actual federal enclaves, "only state law existing at the time of the acquisition remains enforceable, not subsequent laws." *Paul*, 371 U.S. at 268. In other words, "future statutes of the state are not a part of the body of laws in the ceded area. Congressional action is necessary to keep it current." *Sadrakula*, 309 U.S. at 100.

In OCSLA, Congress provided that the laws of the adjacent States in existence at the time and not inconsistent with federal law would apply on the OCS as federal law – just as state law would apply in a newly created federal enclave.[15] Petitioner's contention (at 35) that "applicable," as understood in federal-enclave law, referred to only "those laws necessary to supplement federal law" disregards 130 years of federal-enclave law, in which the Court repeatedly explained that state laws in effect at the time of transfer are "applicable" as federal law so long as they do not conflict with federal policy. *See Paul*, 371 U.S. at 268; *see also State Tax Comm'n of Mississippi*, 412 U.S. at 369 (explaining "local law not inconsistent with federal policy remained in force until altered by

---

[15] Consistent with the prevailing understanding of delegation principles in 1953, Congress applied only state law "as of the effective date of th[e] Act" as federalized state law.

national legislation"); *Sadrakula*, 309 U.S. at 100 (same).

Third, Congress can alter any of these background presumptions – including the principle that subsequently enacted state laws are inapplicable on federal enclaves – through "specific congressional action." *Paul*, 371 U.S. at 263. In 1975, Congress did precisely that as to the OCS, extending to it state law "now in effect or hereafter adopted, amended, or repealed." 43 U.S.C. § 1333(a)(2)(A); *see Sadrakula*, 309 U.S. at 100 (noting congressional action is needed to keep law on an enclave "current").

Finally, petitioner cites only one case for the proposition that pre-existing state law touching "upon the same matters" as federal law is "superseded" by federal law on the creation of an enclave, and that case was describing which *foreign* laws remained in force after the United States acquired territory from a foreign nation. Pet. Br. 34 (citing *Chicago, R.I. & P. Ry. Co. v. McGlinn*, 114 U.S. 542, 546-47 (1885)). The Court recognized that "there is a wide difference between a cession of political jurisdiction from one nation to another, and a cession to the United States by a state of legislative power over a particular tract." *McGlinn*, 114 U.S. at 547. It then explained how Kansas law "remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated." *Id.* The Court concluded by articulating the same mechanics for the application of state law in a federal enclave as expressed in *State Tax Commission of Mississippi*, *Sadrakula*, and *Paul*, with no mention of gap filling. *Id.*

b. Applying relevant state laws that are not incompatible with federal law on the OCS is consis-

tent with how state laws apply on federal enclaves. In *Korndobler v. DNC Parks & Resorts at Sequoia*, No. 1:15-cv-00459-LJO-SKO, 2015 WL 3797625, at *5-6 (E.D. Cal. June 18, 2015), a court applied California's minimum-wage laws to a national park after finding that the laws pre-dated the enclave's creation. However, unlike OCSLA, which provides for ongoing adoption of "applicable and not inconsistent" state laws, Congress has not provided for the ongoing adoption of state labor laws enacted after the transfer of sovereignty on federal enclaves. Therefore, States' later-enacted worker-protection statutes generally do not apply on federal enclaves unless Congress specifically provided otherwise.

3. Petitioner ignores important distinctions Congress established between "jurisdiction," "administration and enforcement," and "applicable" law

OCSLA undisputedly extends federal jurisdiction to the OCS and creates a system of federal enforcement. *See* 43 U.S.C. §§ 1333(a)(1), (a)(2)(A), (a)(3).[16] However, those provisions are consistent with Congress's choice to apply both federal and state law on the OCS. The historical context leading to OCSLA's passage and the subsequent amendments demonstrate that Congress recognized and maintained an important role for adjacent States in offshore-drilling operations off their coasts. Incorporating state legal standards as surrogate federal law on the OCS does not result in "supremacy of state law administered by state agencies." Pet. Br. 5-6, 28, 46 (citing *Continental Oil,*

---

[16] The Secretary is directed to cooperate with other federal agencies and "the affected States" "[i]n the enforcement of safety, environmental, and conservation laws and regulations." 43 U.S.C. § 1334(a).

417 F.2d at 1036). State laws are not "supreme," as federal law displaces inconsistent state law.

Importantly, the Interior Secretary is authorized to issue rules and regulations governing the OCS, 43 U.S.C. § 1334, and these rules and regulations displace inconsistent state law, *id.* § 1333(a)(2)(A). That regulatory power of displacement is crucial to Congress's design because, if the application of any particular state law is undesirable, the Secretary can displace that state standard by issuing regulations to override it. Accordingly, the incorporation of state law as federal law does not cede the United States' jurisdiction over the OCS to state agencies. OCSLA mandates that all laws on the OCS "shall be administered and enforced by the . . . United States," *id.*, and forecloses state-agency administration.[17]

4. Any purported ambiguities in the legislative history cannot override the text's plain meaning

Petitioner's reliance on legislative history to attempt to create ambiguity in the statutory language is backwards. The Court should not consider legislative history when, as here, the text is clear. *See Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the

---

[17] The Fifth Circuit's longstanding reference to *Continental Oil*'s reasoning has no bearing on its correctness. *See* U.S. Br. 19. The Court had no issue rejecting a longstanding Fifth Circuit test in *Valladolid*. *See Valladolid*, 565 U.S. at 215 (rejecting Fifth Circuit test for applicability of Longshore and Harbor Workers' Compensation Act ("LHWCA") under OCSLA). And it is not clear the Fifth Circuit still relies on *Continental Oil*. *See Union Texas Petroleum Corp. v. PLT Eng'g, Inc.*, 895 F.2d 1043 (5th Cir. 1990).

text is not absurd – is to enforce it according to its terms."). In any event, petitioner's invocation of OCSLA's legislative history does not provide clear evidence of Congress's intent to use "applicable" as meaning "necessary" to fill a "significant void or gap." Rather, it confirms that Congress intended to apply not-inconsistent state legal standards as surrogate federal law.

The Court has recognized that the desire for continuity between laws operating on the OCS and laws operating within adjacent States was an important consideration in enacting OCSLA. A "theme" running through the OCSLA hearings "was the close relationship between the workers on the island and the adjoining State." *Rodrigue*, 395 U.S. at 363. Indeed, "Congress also recognized that the special relationship between [OCS employees] and the adjacent shore . . . favored application of state law with which these men and their attorneys would be familiar." *Huson*, 404 U.S. at 103. These concerns were valid: The employees on offshore rigs start and end their shifts onshore, and at times split their time between onshore and offshore activities and between drilling rigs in state and federal waters.

Indeed, Congress rejected the application of admiralty law as unsatisfactory because, as Senator Cordon explained, "social laws necessary for protection of the workers and their families would not apply." 99 Cong. Rec. 6963 (1953). The Senate Committee instead adopted a combination of federal and state laws, which was ultimately enacted. In presenting OCSLA on the Senate floor, Senator Cordon stated that "the laws of abutting States should become a part of the Federal law .... The [OCS] will have the protection of the Constitution itself, and will have the

protection and provision for conduct of affairs as given by the laws of each of the abutting States." *Id.* at 6963-64. Accordingly, "Congress specifically rejected national uniformity and specifically provided for the application of state remedies." *Huson*, 404 U.S at 104.

In the following colloquy, Senator Cordon addressed the exact question now before the Court: whether state laws apply on the OCS when federal law regulates the same subject matter.

> Mr. DANIEL. . . . Since we have applied State laws in the fields which are not covered by Federal laws or by regulations . . . , I should like to ask . . . whether . . . State laws relating to conservation will apply in this area until and unless the Secretary of the Interior writes some rule or regulation to the *contrary*.
>
> Mr. CORDON. . . . The language clearly adopts State law as Federal law *where it is not inconsistent with* existing Federal law or with the rules and regulations of the Secretary of the Interior . . . . When [the Secretary] has adopted them, those rules and regulations *must be inconsistent with or in conflict with* the conservation laws of the States, which are then the conservation laws of the United States with respect to that particular area, *or else the laws of the States, having been adopted by the United States, apply to that area.* . . . [T]he language of [§ 1333(a)(2) will be] read as pari materia, give effect to both.

99 Cong. Rec. at 7264 (emphases added). In short, Senator Cordon explained that, unless a state law is inconsistent with federal law, state legal standards would be adopted as surrogate federal law. The fact

that state and federal law may overlap on some subject matters has no bearing on its application.[18]

B. Petitioner's Attempt To Manufacture Inconsistency Between California's Wage-And-Hour Laws And The FLSA Ignores Both Statutes' Text And Purpose

Neither law nor common sense supports petitioner's argument that when Congress has passed a statute setting minimum federal standards – and included a clause saving from preemption the application of more generous state laws – a state law providing something above that floor is inconsistent with federal law.

1. "Not inconsistent" does not mean "not different"

Petitioner asserts (at 39) that, because California's laws are "different" from federal laws, they are "inconsistent" with federal laws and therefore inapplicable on the OCS. However, the ordinary meaning of "not inconsistent" does not mean merely "not different." This argument also conflates petitioner's interpretation of "applicable" (requiring there to be no federal law) and "not inconsistent" (requiring there to be no *different* federal law).

a. Petitioner is correct that California's wage-and-hour laws are in some instances *different* from the FLSA. For example, the FLSA mandates a $7.25

---

[18] While the Senate Report suggests state law applied only in the absence of federal law, Pet. Br. 24; U.S. Br. 14-15, the later-adopted House Conference Report, reconciling the Senate and House bills, stated that, when "not inconsistent with this act and other Federal laws and regulations, the laws of adjacent States are adopted as the laws of the United States." H.R. Conf. Rep. No. 83-1031, at 12 (1953). The quoted Daniel-Cordon exchange stating overlapping state and federal law would coexist occurred after the Senate Report was published.

hourly minimum wage and California prescribes a $12 hourly minimum wage. However, the existence of two different minimum wages does not make the provisions "incompatible" or "contradictory." Petitioner's argument is contrary to the FLSA's text, which provides that the minimum wage must be "*not less than*" $7.25. 29 U.S.C. § 206(a)(1) (emphasis added). California's minimum wage is "not less than" $7.25, and therefore not inconsistent with the FLSA despite being different from the federal minimum wage.

Petitioner's argument would make sense only if the FLSA set a ceiling, dictating that the federal minimum wage *must not be more than* $7.25. In that circumstance, any state law that exceeded the federal ceiling would be inconsistent with the FLSA. It defies logic to say that a more generous state minimum wage is inconsistent with a federal statute explicitly allowing States to set more generous minimum wages.

Consistent with *Powell*, the California and federal minimum wages are not "mutually exclusive." *See* 339 U.S. at 519 (rejecting argument that different federal minimum wages were "mutually exclusive"). Petitioner has not demonstrated that "compliance with one . . . makes it impossible to comply with the other." *Id.* Nor is it impossible to determine "respective wage requirements under each [statute] and then apply[] the higher requirement." *Id.* Indeed, Congress contemplated that employers may face overlapping wage requirements and resolved any concerns through the savings clause's directive to apply the higher requirement. *Id.* at 518.

b. Petitioner's argument (at 40) that the existence of two different methods of calculating hours worked makes California law "inconsistent with" federal law is similarly flawed. First, under the savings

clause, States are free to impose more demanding wage-and-hour standards, and nothing in the federal compensable-time rules limits the savings clause's operation. By their terms, the hours-worked "principles" promulgated by DOL guide employers in complying with the FLSA's minimum-wage and overtime requirements. *See* 29 C.F.R. § 785.1. Thus, "[t]hese are rules of federal law. States are free to set higher hourly wages or shorter periods before overtime comes due. That's what § 218(a) says." *Spoerle v. Kraft Foods Glob., Inc.*, 614 F.3d 427, 429 (7th Cir. 2010) (holding FLSA provision excluding time spent changing clothes as hours worked did not preempt Wisconsin law including that same time as hours worked for purposes of state wage-and-hour law). As the Seventh Circuit reasoned, because higher state minimum-wage laws trump the FLSA, "it must be equally so for the number of hours, because how much pay a worker receives depends on the number of hours multiplied by the hourly rate. It would be senseless to say that a state may control the multiplicand but not the multiplier." *Id.*

Second, although petitioner casts the two tests as incompatible, both federal and California law use a multifactor test for determining compensability of off-duty time. *Compare* 29 C.F.R. § 785.22(b) ("If the [sleeping] period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be [compensable].") *and id.* § 785.16(a) (whether off-duty time is compensable "depends upon all of the facts and circumstances of the case") *with Mendiola v. CPS Sec. Sols., Inc.*, 340 P.3d 355, 359-60 (Cal. 2015) (noting "whether on-call time constitutes hours worked . . . focuse[s] on the extent of the employer's control" and citing multiple factors, many from federal law, for determining control).

Whether respondent's total hours worked differ under federal and state law is a fact-intensive inquiry, which would be premature to engage in at this stage of the litigation.[19]

c. The Court's decision in *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), further highlights the absurdity of petitioner's inconsistency argument. There, the Court addressed whether state workers' compensation laws and the federal LHWCA were inconsistent, such that only the LHWCA applied to land-based injuries. The Court noted that Congress's goal of raising worker compensation "awards to a federal minimum" was "in no way inconsistent" with applying both state and federal law, because there was no indication "that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits." *Id.* at 723-24. Thus, the Court was "not persuaded that the bare fact that the federal and state compensation systems are different gives

---

[19] Respondent's claims for paystub violations, failure to pay timely wages, and failure to provide meal periods each address gaps in the FLSA, and thus are not inconsistent under even petitioner's interpretation of OCSLA. Although petitioner contends (at 31-32) the FLSA addresses each of these claims, the provisions cited by petitioner are inapposite to respondent's claims. Section 211(c) requires employers to keep wage-and-hour records, but does not require the employer to provide such information to employees. *Compare* 29 U.S.C. § 211(c) *with* Cal. Lab. Code § 226(a). Section 216(b) imposes penalties on employers that fail to comply with FLSA's minimum-wage and overtime requirements, but makes no mention of timely paying terminated employees. *Compare* 29 U.S.C. § 216(b) *with* Cal. Lab. Code § 201(a). And 29 C.F.R. § 785.19 addresses whether bona fide meal periods count as hours worked for the purposes of overtime calculations, but is silent as to whether mealtimes must be provided at all. *Compare* 29 C.F.R. § 785.19 *with* Cal. Lab. Code § 512(a). Even if petitioner's "gap-filling" interpretation prevails, therefore, those claims still would advance on remand.

rise to a conflict that . . . necessitates exclusivity for each compensation system within a separate sphere." *Id.* at 725. Here, too, the FLSA establishes federal minimum worker protections. Congress was not concerned with any conflict between an "adequate federal" minimum wage and a "superior state" minimum wage.

2. Nothing in OCSLA requires ignoring the FLSA's savings clause

a. Petitioner's argument (at 29-30) that applying state legal standards would require the same sovereign to impose two competing sets of federal laws is far overblown. As *Powell* demonstrates, differing federal minimum wages are not unique to the OCS. *See* 339 U.S. at 519-20; *compare* Establishing a Minimum Wage for Contractors, Notice of Rate Change in Effect as of January 1, 2019, 83 Fed. Reg. 44,906 (Sept. 4, 2018) (setting $10.60 minimum wage for federal contractors), *with* 29 U.S.C. § 206(a) (setting $7.25 minimum wage). Whether onshore or offshore, the FLSA's savings clause directs the application of the higher requirement. *See Powell*, 339 U.S. at 519.

b. Petitioner's attempt (at 42) to manufacture inconsistency by declaring the savings clause is "triggered only by *an inconsistency* between state and federal law" has no support in the FLSA's text. The provisions setting federal minimum-wage and hour laws explicitly allow for more generous state laws. 29 U.S.C. §§ 206(a)(1), 207(a). Additionally, the savings clause dictates that, when a wage standard differs from the FLSA, the more generous standard should prevail. The savings clause actually ensures consistency between different state and federal laws.

c. Petitioner contends (at 43) that preemption principles should not apply to OCSLA's governing-law

provision because "state sovereignty" is "inapposite on the OCS." *See also* U.S. Br. 8. The plain meaning of "not inconsistent" and the FLSA's clear provisions allowing application of more protective state wage-and-hour laws require incorporation of California's state legal standards into the federal OCS law, without any need for the Court to address state sovereignty.

That said, preemption principles do inform what the phrase "not inconsistent with" means. For example, in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), the Court considered whether the more generous pregnancy-discrimination protections in the California Fair Employment and Housing Act were "inconsistent" with, and therefore preempted by, the protections in the federal Pregnancy Discrimination Act ("PDA"). *See id.* at 276-79. Congress provided that the PDA should not "'be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of th[e] Act, or any provision thereof.'" *Id.* at 282 (quoting 42 U.S.C. § 2000h-4). In determining whether California's law was "inconsistent" with the PDA, the Court considered whether the PDA prohibited States from providing more generous pregnancy-discrimination protections. The Court concluded the two statutes were not inconsistent, because Congress intended the PDA to be "a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise" – and California's law at issue furthered the PDA's goal of equal employment opportunity. *Id.* at 285-89. The same analysis can be used to interpret "not inconsistent" in OCSLA – the FLSA provides a floor beneath which worker protections cannot drop, and California's wage-and-hour laws further the

FLSA's goal of protecting workers. Therefore, there is no inconsistency.[20]

IV. PETITIONER'S APPROACH CREATES ADMINISTRABILITY PROBLEMS

A. Sound Policy Counsels For Making The Same Legal Standards Apply To Employees Working Onshore Or Offshore

Companies operating drilling rigs on the OCS also employ individuals to service the land-based operations supporting the drilling process. These onshore-processing facilities are physically connected to offshore platforms via pipelines and also are "closely linked" operationally. Tr. of Pub. Hr'g of IWC (Oct. 5, 2000) (testimony of Kent Rogers).[21] Some employees even split their time between upland and OCS activities, and even between rigs in state waters and the OCS. In applying state legal standards to operations on the OCS, Congress enabled these interrelated facilities to operate as a cohesive unit.

Shore-to-shelf continuity benefits both operators and their employees. Employee shift changes are tied

---

[20] Oddly, the government argues (at 25) that ordinary preemption principles should not apply, but then also argues (at 24) that *Lewis*, which relies on ordinary preemption principles, should apply. *See* 523 U.S. at 164-65. *Lewis* addressed how to determine if there is a "gap" in federal law – a necessarily narrower question. *Id.* at 164.

The government also argues (at 29) that applying preemption principles undermines Congress's decision not to adopt an amendment that would have made state law directly applicable to the OCS. However, that amendment proposed to establish state police power over the OCS and was broader than OCSLA's requirement that only "not inconsistent" state legal standards apply as federal law.

[21] *Available at* https://www.dir.ca.gov/iwc/PUBHRGo5.htm.

to operational safety and are meticulously synchronized between the onshore and offshore facilities to mitigate accidents during the turnover. Keeping wage-and-hour standards consistent onshore and offshore enables coordinated work schedules that optimize operations and safety. *See id.* Employers also benefit from not having to keep two different sets of books tracking onshore versus offshore employee hours. Employees, their families, and their lawyers should benefit from the familiar laws of California, *see Huson*, 404 U.S. at 103, regardless of how time is split between land and the OCS.

B. Petitioner's Interpretation Disrupts Established Methods Of Applying State Laws On Federal Enclaves

The benefits of local uniformity between state and federal standards on federal enclaves is not unique to the OCS. In national parks and forests, federal officials administer applicable federal and state laws on numerous topics, including alcohol sales and hunting. *See, e.g.*, 36 C.F.R. § 2.15(b) (allowing hunting dogs "in accordance with applicable Federal and State laws"); *id.* § 5.2(a) (adopting "all applicable Federal, State, and local laws and regulations" for "[t]he sale of alcoholic, spirituous, vinous, or fermented liquor"); *id.* § 241.23(a) (adopting "applicable State and Federal law" for hunting, trapping, or fishing). A hunter can spend one weekend on federal land and another on state land while complying with the same legal regime. Under petitioner's interpretation of "applicable," however, this legal regime becomes complicated for everyday park-goers. What state laws are "applicable" would no longer be a simple question of what state laws are relevant, but a question that requires first dissecting the U.S. Code and the C.F.R. to

determine if there is a void or gap in federal law. Petitioner's desire for a specialized outcome for its oil and gas operations would disrupt the accepted understanding of how state and federal laws coexist on federal enclaves.

C. Other Policy Considerations Argue For Rejecting Petitioner's Interpretation

1. Petitioner's concerns (at 45-46) that applying state laws to the offshore platforms place operators in California and Louisiana under different legal regimes is overstated and not a reason to depart from OCSLA's plain text. There is nothing remarkable about sophisticated companies complying with multiple regulatory schemes when their operations span multiple jurisdictions. Indeed, petitioner maintains both *on*shore and *off*shore-drilling operations in the United States. It already must conform to state laws for its land-based operations.[22] In choosing to adopt a regime reliant on state and federal law, Congress knowingly rejected interstate uniformity as a goal of OCSLA. *See Gulf Offshore*, 453 U.S. at 487.

In fact, California's laws are applied offshore in other instances where Louisiana's and Texas's are not. For example, under § 328 of the Clean Air Act, for OCS facilities located within 25 miles of a State, Environmental Protection Agency ("EPA") regulations are to be "the same as would be applicable if the source were located in the corresponding onshore area." 42 U.S.C. § 7627(a)(1). This includes "[s]tate and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting." *Id.* States can seek delegation from EPA to enforce

---

[22] Petitioner's drilling operations in Guatemala, Iraq, and Russia raise substantial doubt that petitioner otherwise benefits from regulatory simplicity.

these requirements, *see id.* § 7627(a)(3), and California has done so, *see* 40 C.F.R. § 55.15. However, § 328 does not apply to the central and western Gulf of Mexico, and emissions there are regulated by the Interior Secretary.

2. Petitioner's contention (at 46-47) that federal agencies enforcing state laws is "anomalous" ignores multiple instances where the federal government is tasked with enforcing state law. On federal enclaves, federal law-enforcement officers are charged with enforcing state criminal law, adopted as federal law under the Assimilative Crimes Act, 18 U.S.C. § 13. In national parks, federal law-enforcement officers enforce overlapping state and federal laws and regulations. And, in federal facilities, federal agencies and departments are required to comply with federal, state, and local clean-air, clean-water, and hazardous-waste standards. *E.g.*, 33 U.S.C. § 1323 (water-pollution standards); 42 U.S.C. § 7418 (air-pollution standards); 42 U.S.C. § 6961 (solid- or hazardous-waste standards). EPA is tasked with enforcing violations of these various laws on federal facilities. *Id.*

Petitioner's argument (at 46-47) also fails to address specific OCSLA provisions capable of relieving the "burdens" on federal officials administering OCSLA. *See also* U.S. Br. 8, 30-31. For example, if federal officials do not like the application of any particular state standard, the Interior Secretary can issue regulations inconsistent with the state requirements and thereby displace them. Second, the Secretary is required to "cooperate with the relevant departments and agencies of the Federal Government and of the affected States" to enforce "safety, environmental, and conservation laws and regulations." 43 U.S.C. § 1334(a). Accordingly, the burden of enforcing state

safety, environment, and conservation laws does not fall exclusively on federal officers. Third, the Secretary is permitted to enter cooperative agreements with States "to carry out applicable Federal and State laws, regulations, and stipulations." *Id.* § 1345(e). Therefore, if the federal government does not want to enforce particular state laws, the Secretary can enlist States to do so.

3. Petitioner's assertion (at 48) that existing compensation agreements will have to be rewritten has no factual support. To the contrary, an audit of payroll practices on the OCS indicates that contracts between operators and their employees or their unions already apply California wage-and-hour laws on the platforms or contain provisions that mirror California laws.[23] Indeed, petitioner also already has adopted certain California wage-and-hour practices that do not exist in the FLSA, such as paying employees like respondent double overtime. Wage Order 16, covering offshore-drilling activities, provides a safe harbor to employers that have entered into collective-bargaining agreements. *See* 8 Cal. Code Regs. § 11160.3(H)(2) (providing that certain provisions do not apply if a "collective bargaining agreement expressly provides otherwise"); Cal. Lab. Code §§ 510(a)(2), 514

---

[23] *See, e.g.*, Answering Br. 6, 10, *Curtis v. Irwin Indus., Inc.*, No. 16-56515 (9th Cir. Feb. 28, 2018) (Collective Bargaining Agreement, stating: "The parties to this Agreement recognize and agree that Industrial Wage Order 16-2001 covers [Irwin's] operation and recognize the applicability of and incorporate the provisions of Industrial Wage Order 16-2001"); *Jensen v. Safety Equip. Corp.*, No. 2:18-cv-02890-RGK-GJS, ECF #28-12, at 1 (C.D. Cal. July 5, 2018) ("This [employment] Agreement includes ... the duties imposed on employees by law pursuant [to] the California Labor Code, all of which are incorporated herein by reference.").

(same). Wage Order 16 also contains an alternative workweek schedule drilling operators can adopt to largely avoid paying overtime to offshore workers. *See* 8 Cal. Code Regs. § 11160.3(B)(1)(h). Operators and employees therefore can continue to rely on mutually beneficial agreements and comply with the law.

4. Petitioner's concern (at 48-49) that States could destroy offshore drilling by enacting increasingly stringent requirements to be imputed offshore through OCSLA is mistargeted. The articles petitioner cites (at 49) contend California *already* is trying to regulate offshore drilling but is doing so through regulation of *on*shore facilities and pipelines, upon which offshore facilities rely. For its argument to carry any weight in this case, however, petitioner must demonstrate how OCSLA precludes such exercises of state sovereignty to state onshore activity, which Congress clearly did not intend to displace.

5. Petitioner's concern (at 49-50) about "opportunistic plaintiffs" applies equally to companies operating on land. Changes in state wage-and-hour laws in California have not destroyed onshore business through "windfall[s]" and "massive retroactive liability"; there is no reason to fear the offshore-drilling industry would fare differently.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

MICHAEL A. STRAUSS
ARIS E. KARAKALOS
STRAUSS & STRAUSS, APC
121 N. Fir Street
Suite F
Ventura, CA 93001
(805) 641-6600

ERIN GLENN BUSBY
LISA R. ESKOW
MICHAEL F. STURLEY
727 East Dean Keeton St.
Austin, TX 78705
(512) 232-1350

DAVID C. FREDERICK
Counsel of Record
ANA NIKOLIC
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
(dfrederick@kellogghansen.com)

March 22, 2019

No. 18-389

In the
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(659) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
LAURA WOLK
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

April 9, 2019

RECEIVED
APR - 9 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF 1
ARGUMENT 2
I. The FLSA, Not California Wage-And-Hour Law, Supplies The Applicable Federal Law On The OCS 2
A. California Wage-And-Hour Law is Inapplicable on the OCS Because the FLSA Provides the Applicable Federal Wage-And-Hour Rules 2
B. California Wage-And-Hour Law Does Not Extend to the OCS Because It is Inconsistent With the FLSA 13
C. Applying California Wage-and-Hour Law on the OCS Produces Results Congress Never Intended 19
CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Allison v. Boeing Laser Tech. Servs.,
689 F.3d 1234 (10th Cir. 2012) 10

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 12

Chi. Rock Island & Pac. Ry. Co. v. McGlinn,
114 U.S. 542 (1885) 7, 8

Christopher v. SmithKline Beecham,
567 U.S. 142 (2012) 13

Cont'l Oil Co.
v. London S.S. Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) 12

Decker v. Nw. Envtl. Def. Ctr.,
568 U.S. 597 (2013) 14

Evenwel v. Abbott,
136 S. Ct. 1120 (2016) 13

George v. UXB Int'l, Inc.,
1996 WL 241624 (N.D. Cal. May 3, 1996) 10

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 12

James Stewart & Co. v. Sadrakula,
309 U.S. 94 (1940) 9

Loughrin v. United States,
573 U.S. 351 (2014) 3

Manning v. Gold Belt Falcon, LLC,
681 F. Supp. 2d 574 (D.N.J. 2010) 10

Mersnick v. USProtect Corp.,
2006 WL 3734396 (N.D. Cal. Dec. 18, 2006) 10

New Prime Inc. v. Oliveira,
139 S. Ct. 532 (2019) 17

Paul v. United States,
371 U.S. 245 (1963) 9

Powell v. U.S. Cartridge Co.,
339 U.S. 497 (1950) 16, 18

Ransom v. FIA Card Servs.,
562 U.S. 61 (2011) 3, 6

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 353 (1969) ..... *passim*

Shell Oil Co. v. Iowa Dep't of Revenue,
488 U.S. 19 (1988) 4

Sturgeon v. Frost,
No. 17-949, slip op. (Mar. 26, 2019) 4, 20

Sun Ship, Inc. v. Pennsylvania,
447 U.S. 715 (1980) 17

United States v. Alexander,
602 F.2d 1228 (5th Cir. 1979) 21

United States v. Sharpnack,
355 U.S. 286 (1958) 9, 10

United States v. Tax Comm'n of Miss.,
412 U.S. 363 (1973) 9

Wachovia Bank, N.A. v. Schmidt,
546 U.S. 303 (2006) 5

Yates v. United States,
135 S. Ct. 1074 (2015) 5

Statutes

29 U.S.C. §218 16

43 U.S.C. §1333 ..... 4, 6, 17

43 U.S.C. §1334 21

Other Authorities

99 Cong. Rec. 6963 (1953) 8
99 Cong. Rec. 7164 (1953) 10
99 Cong. Rec. 7264 (1953) 11
Black's Law Dictionary (10th ed. 2014) 14
Random House Dictionary of the English Language (2d ed. 1987) 14
S. Rep. No. 83-411 (1953) 10

REPLY BRIEF

California wage-and-hour law is neither applicable to the Outer Continental Shelf (OCS) nor consistent with the Fair Labor Standards Act (FLSA). In contending otherwise, respondent doubles down on the Ninth Circuit's reasoning that state law applies on the OCS whenever it "pertains to the subject matter at hand" and is consistent with federal law as long as it would not be preempted onshore. That approach reads the word "applicable" out of the statute and produces the choice-of-law regime Congress considered and rejected in enacting the Outer Continental Shelf Lands Act (OCSLA).

In OCSLA, Congress expressly rejected proposals for state law to apply on the OCS as a default matter unless preempted. Instead, Congress deliberately chose to treat the OCS as a federal enclave where all law is federal and state law provides the rule of decision only where there is a gap in federal law. Even then, state law is converted into federal law and administered by federal officials. Here, there is no gap as the FLSA provides a comprehensive federal wage-and-hour regime governing everything from the appropriate minimum wage to when sleep time must be compensated. Given that Washington has already answered those questions, there is no reason to look to Sacramento for surrogate federal law. Nor is there any basis to pay respondent for a 168-hour work week when the FLSA and the parties' agreement entitle him to pay for the 84 hours he actually worked. The Ninth Circuit's decision upends five decades of settled law on the OCS and should be reversed.

ARGUMENT

I. The FLSA, Not California Wage-And-Hour Law, Supplies The Applicable Federal Law On The OCS.

A. California Wage-And-Hour Law is Inapplicable on the OCS Because the FLSA Provides the Applicable Federal Wage-And-Hour Rules.

1. Respondent follows the Ninth Circuit's lead in arguing that state law is "applicable" to the OCS under OCSLA whenever it "pertain[s] to the subject matter at hand." Resp.Br.22. That argument suffers from multiple flaws. First, respondent focuses on the word "applicable" in isolation and ignores the broader statutory context. Section 1333(a)(2)'s reference to "applicable" state law does not stand alone. It follows §1333(a)(1)'s extension of federal law to the OCS and decision to treat the OCS as a federal enclave. The balance of §1333(a)(2) then makes clear that state law never applies of its own force, but is converted to federal law to be administered by federal officials. And §1333(a)(3) underscores that even when state law applies to the OCS, it provides no basis for any claim of state sovereignty or any state interest in the OCS for any purpose. When §1333(a) is considered in its entirety, it is plain that state law is "applicable" or "suitable" or "appropriate" for application on the OCS as surrogate federal law to be administered by federal officials under §1333(a)(2) only when there is a gap in the actual federal law made directly applicable to the OCS pursuant to §1333(a)(1).

Despite his focus on the word "applicable" in isolation, respondent advances an interpretation that

"would render the term 'applicable' superfluous." *Ransom v. FIA Card Servs.*, 562 U.S. 61, 74 (2011). If Congress wanted to adopt non-conflicting state law whenever it "pertains to the subject matter at hand," it could have omitted the word "applicable" altogether, because irrelevant laws would never be implicated on the OCS either way. *See* Pet.Br.37-38; U.S.Br.20. The statute would have the same meaning if the words "applicable and" were struck from the statute and OCSLA borrowed state laws "to the extent they are ~~applicable and~~ not inconsistent with" federal law. Rendering critical words without effect violates cardinal principles of statutory construction. *See, e.g.*, *Loughrin v. United States*, 573 U.S. 351, 358 (2014).[1]

Respondent's attempt to give "applicable" some practical effect under his interpretation only underscores the problem. He suggests that Congress included the term "applicable" to ward off the possibility that state laws about hunting dogs and pecan trees would govern the OCS. Resp.Br.22, 37, 52. But Congress did not need any statutory language to filter out such laws. Those state laws filter themselves out because they address issues that do

---

[1] Respondent's superfluity problem does not end there. Because respondent would interpret "not inconsistent with" merely to invoke conflict preemption principles that apply even when Congress is silent, respondent manages to render all the critical words in §1333(a)(2) superfluous. If Congress had wanted to extend the laws of adjacent states to the OCS and have them apply in the same way they apply onshore—*i.e.*, whenever relevant and not preempted—it would have adopted Senator Long's amendment to do just that. *But see Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 353, 359 (1969) (noting that "the amendment was rejected").

not arise on the OCS. The absence of hunting dogs and pecan trees on the OCS, rather than any meaning of "applicable," whether ordinary or esoteric, renders those laws irrelevant. Respondent thus cannot escape the reality that, under his interpretation, the word "applicable" could be "remove[d]" from the statute and "everything would be precisely the same." *Sturgeon v. Frost*, No. 17-949, slip op. at 21 (Mar. 26, 2019).[2]

Respondent passingly invokes OCSLA's express exclusion of state taxation laws as evidence that "applicable" must have a broader meaning than "gap-filling." Resp.Br.22-23. Even the Ninth Circuit did not adopt this argument, and for good reason. The specific exclusion for state tax laws reinforced that states could not impose certain taxes on businesses operating on the OCS—for example, severance and production taxes—*regardless of* whether there were existing federal laws addressing those matters. *See generally Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 29-30 (1988); Pet.Br.38 n.7.

---

[2] Respondent contends that petitioner's and the United States' interpretation of "applicable" "renders superfluous the term 'not inconsistent,'" because they cannot "articulate a scenario where a state law can be 'applicable' ... yet 'inconsistent with' federal law." Resp.Br.37. This assertion is mystifying, as petitioner and the United States both presented examples of scenarios where the phrases do independent work. *See* Pet.Br.41 n.8; U.S.Br.25-26. Moreover, §1333(a)(2) requires consistency with federal statutes *and* Interior Secretary regulations, such that even when there is a gap in federal statutory law and state law is therefore applicable to the OCS, it must operate in a manner consistent with the Secretary's regulations "in effect or hereafter adopted." 43 U.S.C. §1333(a)(2)(A).

Respondent observes that "Congress used 'applicable' in numerous other OCSLA provisions" and argues that the "only way to give 'applicable' a consistent and coherent meaning throughout the text is to use its ordinary meaning." Resp.Br.23-24. But it is not clear that any of OCSLA's uses of "applicable" means anything other than the law applicable by virtue of a proper interpretation of §1333(a)'s choice-of-law provisions. Moreover, even assuming "applicable" means "suitable" or "appropriate" throughout OCSLA, what is "suitable" for purposes of one statutory provision is not necessarily "suitable" for another. The definition remains consistent, but what is "suitable" depends on context. As already explained, the broader context of §1333(a) makes plain that state law is "applicable" or "suitable" for conversion into surrogate federal law to govern the OCS only when there is a gap in the actual federal law extended to the OCS by §1333(a)(1). In all events, the principle that respondent invokes is far from absolute even with words that are less context-dependent than "applicable" or "suitable." "In law as in life, ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015); *accord Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 313-14 (2006).

As both petitioner and the United States have explained, this Court's decision in *Ransom* underscores the flaws in respondent's reading of "applicable." Pet.Br.35-36; U.S.Br.11. Respondent contends that *Ransom* is unavailing because the Court used "context" and "purpose" there not to "depart from the ordinary meaning of the statute" but to "'support' and 'strengthen[]'" its plain meaning. Resp.Br.36.

Just so here. *Ransom* acknowledged that "applicable" means "suitable," "fit," or "appropriate," but then proceeded to use the statutory context to determine "[w]hat makes an expense amount 'applicable' in this sense." 562 U.S. at 69. Here, too, the broader context of §1333(a) makes clear that state law is "applicable"—*i.e.*, "suitable" or "appropriate"—for conversion into surrogate federal law to govern the OCS under §1333(a)(2) only when there is a gap in the actual federal law extended to the OCS under §1333(a)(1). Respondent contends that his construction of "applicable" is similar to that in *Ransom* because it "also serves as a 'filter,'" Resp.Br.36-37, but if all respondent's interpretation filters out are laws concerning hunting dogs, pecan trees, and other things that have not yet made their way to the OCS, then "applicable" serves no "filtering" function or any function at all. *See* pp.3-4, *supra*.

2. In insisting that state law governs the OCS in much the same way it applies onshore—*i.e.*, whenever it pertains to the subject at hand and is not preempted—respondent largely ignores both §1333(a)(1) and the limited role of state law on federal enclaves more generally. Section 1333(a)(1) expressly states that "[t]he Constitution and laws and civil and political jurisdiction of the United States are extended to the [OCS] ... to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1333(a)(1). As this Court has observed, that provision firmly establishes that all law on the OCS is federal law, and that federal law applies on the OCS's structures "as though they were federal enclaves in an upland State." *Rodrigue*, 395 U.S. at 355.

Respondent cannot dispute that Congress expressly made all law on the OCS federal law and so dismisses it as "beside the point." Resp.Br.33-34. But the point is critical, for it renders considerations of state sovereignty and principles of preemption wholly inapposite on the OCS. What is more, it underscores that state law *never* applies on the OCS of its own force, but extends only pursuant to the extraordinary process of being converted into federal law to be administered by federal officials. To assume that Congress intended that extraordinary process of creating surrogate federal law to occur unnecessarily when actual federal law already comprehensively addresses a subject is to commit a fundamental error.

Congress' decision to treat the OCS as a federal enclave is equally consequential. This Court has long made clear that state law is not generally "applicable" on federal enclaves. To the contrary, when Congress creates a new federal enclave, previously applicable state laws are "necessarily ... superseded by existing laws of the new government *upon the same matters.*" *Chi. Rock Island & Pac. Ry. Co. v. McGlinn*, 114 U.S. 542, 546-47 (1885) (emphasis added). At the same time, existing state laws governing matters not addressed by federal law extend to the enclave to avoid gaps or voids in the law applicable to the enclave. *See id.*; U.S.Br. at 4, 12 (citing *McGlinn* and noting that "[w]hen Congress enacted [OCSLA], choice-of-law principles governing federal enclaves were well-established" and dictated that "state law applies only when federal law leaves a gap").

Respondent makes the bold claim that the federal government "misunderstands how law applies on

federal enclaves." Resp.Br.37. In particular, respondent suggests that *McGlinn* and its principle that state law serves only a gap-filling function on federal enclaves are limited to the cession of jurisdiction from one nation to another, rather than from a state to the federal government. Resp.Br.40. That contention is mistaken and misplaced. It is mistaken because *McGlinn* rejected that exact argument. While acknowledging "a wide difference between a cession of political jurisdiction from one nation to another, and a cession to the United States by a state of legislative power over a particular tract," the Court immediately went on to say that "the principle which controls as to laws in existence at the time *is the same in both*." *McGlinn*, 114 U.S. at 547 (emphasis added). It is misplaced because the OCS was never within the jurisdiction of any state and was determined to be within federal jurisdiction by statute and judicial decision even before OCSLA was enacted. *See* Pet.Br.4-5.

In either event, as the federal government correctly understands, the applicability of state law on the federal enclave that is the OCS is strictly limited to filling gaps in federal law. Because the FLSA predated OCSLA, there never was a gap in the federal law applicable to the OCS, and state wage-and-hour law was never applicable. *See Rodrigue*, 395 U.S. at 362 (explaining that Congress extended all federal law to OCS in order to extend, *inter alia*, "'fair-labor-standard laws'" (citing 99 Cong. Rec. 6963 (1953))).[3]

---

[3] Respondent attempts to buttress his superior understanding of federal-enclave law by invoking four largely irrelevant principles and three off-point cases, *United States v. Tax*

Respondent attributes considerable significance to Congress' 1975 amendment of OCSLA to make clear that state law enacted or promulgated after OCSLA's effective date can apply to the OCS. Resp.Br.8-9, 40. In reality, that modest amendment did not expand the role of state law on the OCS in the absence of a gap, but just underscores Congress' intent to treat the OCS as an exclusive federal enclave. As originally enacted, OCSLA avoided a potential delegation problem identified by the Justice Department by limiting any borrowed state law to then-extant law. That provision was consistent with Congress' explicit statement in §1333(a)(3) that it was *not* recognizing any ongoing state sovereignty over the OCS, but rather looked to state law for a limited gap-filling purpose. None of that changed in 1975 when Congress accepted a Justice Department suggestion to amend OCSLA to authorize the borrowing of subsequently enacted state law. Instead, what changed was that this Court decided *United States v. Sharpnack*, 355 U.S. 286 (1958), and made clear while interpreting the Assimilative Crimes Act that there was no delegation problem with borrowing subsequently enacted state

---

Commission of Mississippi, 412 U.S. 363 (1973), *Paul v. United States*, 371 U.S. 245 (1963), and *James Stewart & Co. v. Sadrakula*, 309 U.S. 94 (1940). Respondent cherry-picks isolated phrases from these cases to contend that preexisting state laws "continue in force" within federal enclaves unless they "conflict with federal policy." Resp.Br.38-40. But that is true enough when there are gaps in applicable federal law, and none of those cases involved a competing federal statute addressing the same subject or applied state law in lieu of such an on-point federal law. Moreover, as the United States explains, courts have applied a capacious understanding of when state law conflicts with federal policy on federal enclaves. *See* U.S.Br.22-28.

laws to fill gaps on federal enclaves. *Id.* at 287. The fact that Congress amended OCSLA in light of *Sharpnack* simply highlights that Congress viewed the Assimilative Crimes Act, under which it has long been established that state law applies only to fill gaps in federal criminal law, as a model for OCSLA and the OCS.[4]

3. OCSLA's legislative history confirms the limited gap-filling role of state law on the OCS. Pet.Br.23-25; U.S.Br.14-15. The Senate report could hardly be clearer regarding the role of state law, explaining that state laws are adopted "as Federal law to be used when Federal statutes or regulations of the Secretary of Interior are inapplicable." S. Rep. No. 83-411, at 2, 23 (1953). And Senator Anderson, a member of the conference committee, explained on the Senate floor that "Federal law and regulations shall be applicable in the area, but where there is a void, the State law may be applicable." 99 Cong. Rec. 7164 (1953); *see also Rodrigue*, 395 U.S. at 357-58 (surveying same legislative history).

Respondent never acknowledges that ample legislative history. Instead, respondent emphasizes a brief colloquy concerning the effect of federal

---

[4] Respondent invokes a single unpublished opinion applying state wage-and-hour laws to a federal enclave. Resp.Br.41. But multiple courts have reached the opposite result. *See, e.g.*, *Manning v. Gold Belt Falcon, LLC*, 681 F. Supp. 2d 574, 576 (D.N.J. 2010); *Mersnick v. USProtect Corp.*, 2006 WL 3734396, at *7 (N.D. Cal. Dec. 18, 2006); *George v. UXB Int'l, Inc.*, 1996 WL 241624, at *1-2 (N.D. Cal. May 3, 1996). More generally, courts recognize that "no federal statute yet allows the broad application of state employment ... law to federal enclaves." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1238 (10th Cir. 2012).

regulations on state conservation laws "applied ... in the fields which *are not covered* by Federal laws or by regulations." 99 Cong. Rec. 7264 (1953) (emphasis added). Senator Cordon responded that, in those circumstances, state conservation laws would govern as federal law unless and until the Secretary of the Interior adopted inconsistent regulations. *See id.* The entire colloquy proceeded on the explicit premise that state law applied because there was a gap in federal law. Thus, respondent's own hand-picked colloquy reinforces that state law is borrowed as surrogate federal law only "in the fields which are not covered by Federal laws."

In implicit recognition that the legislative history undercuts his view, respondent retreats to the observation that legislative history should not be used to cloud clear statutory text. True enough, but here, far from introducing any ambiguity, the legislative history underscores what the statutory text and context make clear—namely, that state law is suitable for borrowing and conversion into federal law on the OCS only where there is a gap in federal law to be filled. *See Rodrigue*, 395 U.S. at 359 (legislative history "buttresses" conclusion that federal law is exclusive where applicable).

4. This Court's cases have repeatedly recognized that state law applies to the OCS to fill gaps in federal law. Pet.Br.25-29; U.S.Br.16-20. In *Rodrigue*, for example, this Court extensively traced OCSLA's history, including Congress' rejection of the wholesale application of either maritime law or state law, and its decision to make federal law exclusive. 395 U.S. at 355-58. In summarizing Congress' ultimate choice,

this Court concluded that OCSLA borrowed state law "[where necessary]," *i.e.*, "to fill federal voids." *Id.* at 358, 362 (bracketed phrase supplied by Court); *see also id.* at 357, 362; *accord Chevron Oil Co. v. Huson*, 404 U.S. 97, 101, 104-05 (1971); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981).

Respondent dismisses these decisions because each case involved a gap in federal law. But that fact, which petitioner and the United States readily conceded, disregards that both *Rodrigue* and *Huson* proceeded on the undisputed premise that state law pertained to the subject matter at hand, and yet they nevertheless analyzed whether federal admiralty law applied—an entirely unnecessary inquiry if state law were "applicable" whenever it pertains to the subject matter at hand. U.S.Br.20-21; *see Huson*, 404 U.S. at 101.

Finally, respondent has no answer for the fifty years of unbroken consensus in the lower courts that state law extends to the OCS only to fill gaps in federal law. *See, e.g., Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969); U.S.Br.19-20 (collecting cases and observing that "[t]he decision below appears to be the first to depart from that long-settled understanding of OCSLA"); Freeport.Br.26-28. That unbroken wall of precedent did not just happen. *Continental Oil* resulted from a careful parsing of *Rodrigue*, and later cases likewise faithfully followed this Court's precedents averting to the gap-filling role of state law. Respondent barely acknowledges this extensive precedent. But when an entire industry structures its employment relationships around such a longstanding consensus,

it "is not something to be lightly cast aside." *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016). *See Christopher v. SmithKline Beecham*, 567 U.S. 142, 156-59 (2012).

5. Respondent does not dispute that if petitioner's and the United States' interpretation of "applicable" is correct, California's wage-and-hour law is not applicable on the OCS and the decision below must be reversed. The FLSA comprehensively addresses wage-and-hour issues on the OCS, including the specific claims raised by Newton, so there is no "gap[] in the federal law" and thus no role for California wage-and-hour law. *Rodrigue*, 395 U.S. at 357. When, as here, an employee claims that he has not been compensated for all "hours worked," his dispute can be resolved by looking to the federal statutory and regulatory scheme that Congress created precisely for such disputes. Under such circumstances, there is no need for federal courts and officials to look to Sacramento for surrogate federal law. Congress and federal regulators in Washington have already supplied the answers. There is no reason to saddle those federal regulators with the unusual responsibility of administering California wage-and-hour law on the OCS in addition to the FLSA. One set of federal wage-and-hour laws for the OCS is enough.

B. California Wage-And-Hour Law Does Not Extend to the OCS Because It is Inconsistent With the FLSA.

Even if it were "applicable" to the OCS, California wage-and-hour law still would not provide the content of federal law on the OCS because it is "inconsistent" with the FLSA. Under the FLSA, respondent is

entitled to a minimum wage of $7.25 for 84 hours of work. Under California law, by contrast, respondent claims entitlement to a minimum wage of $12 for a 168-hour "work" week covering every hour spent on the OCS, "even sleeping time." J.A.18. Respondent knows those two legal regimes are not consistent, which is why he sued *only* under California law and only after the California Supreme Court's decision in *Mendiola*. California wage-and-hour officials also recognized that the federal and state requirements were inconsistent, which is why they expressly departed from federal law. *See* Pet.Br.10-11.

Despite all that, respondent insists that the FLSA and California wage-and-hour law are not inconsistent based on dictionary definitions treating "inconsistent" as meaning "'incompatible' or 'contradictory.'" Resp.Br.27; *see* Resp.Br.31, 45-46, 46-47. There are multiple problems with that submission. At the outset, "inconsistent" is hardly uniformly defined to require incompatibility or contradiction, and is typically defined in terms that capture lesser degrees of inconsistency. For example, "inconsistent" is commonly defined as "lacking in harmony," Random House Dictionary of the English Language 968 (2d ed. 1987), or "[l]acking agreement among parts," Black's Law Dictionary (10th ed. 2014); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 617 (2013) (Scalia, J., concurring in part and dissenting in part) (using "inconsistent with" to mean "different from"). Even respondent is forced to concede that the federal and California minimum-wage and sleep-time rules are "different," inharmonious, and "lack[] agreement."

Moreover, to the extent there are degrees of inconsistency, ranging from lack of agreement to outright contradiction, context can help determine what degree of conflict Congress wanted to tolerate. Here, the relevant context is a statute that makes the OCS a federal enclave, declares all law to be federal law, and adopts state law only by converting it to federal law to be administered by federal officials. In that context, there is no reason to think Congress wanted to go to the trouble of borrowing state law and creating surrogate federal law when the resulting law would be inharmonious with existing on-point federal law. Indeed, as the United States thoroughly explains—and respondent largely ignores—federal-enclave doctrine generally adopts a low bar for inconsistency, treating a state law as inconsistent "if it 'would interfere with the achievement of a federal policy,' if adoption of 'state law would effectively rewrite' federally prescribed and 'carefully considered' standards, or if 'federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute.'" U.S.Br.23-24. Under that standard, California wage-and-hour law is "inconsistent with" the FLSA and its carefully considered regulations. U.S.Br.26-27.

That said, this discussion of degrees of inconsistency is largely beside the point as the federal and California wage-and-hour laws are flatly inconsistent under any conception of the term. The FLSA prescribes a minimum wage of $7.25; California prescribes a minimum wage of $12. The FLSA requires compensation for the 84 hours that respondent actually works in a week; California wage-and-hour law requires compensation for the full 168

hours respondent is on the OCS. There is no way that those two diametrically different wage-and-hour regimes can be deemed consistent.[5] To be sure, an employer can comply with both by complying with the more demanding regime, but that is because they are both *minimum*-wage regimes, not because the two minimum-wage regimes are *consistent*. If the two regimes really were consistent, respondent would be indifferent to which regime petitioner followed. Respondent was not indifferent; he sued under California law, and not the FLSA.

Respondent seeks to avoid that straightforward conclusion by invoking the FLSA's saving clause and *Powell v. U.S. Cartridge Co.*, 339 U.S. 497 (1950). But neither helps respondent. As petitioner and the United States have explained, the saving clause is not even implicated without "some measure of inconsistency between the FLSA and another law." U.S.Br.29; Pet.Br.42. Respondent's answer—that the saving clause "actually ensures consistency between different state and federal laws," Resp.Br.49—is mistaken. In reality, the saving clause does not make different state and federal laws consistent. Instead, it tells an employer that complying with the FLSA does not "excuse non-compliance" with a more demanding—*i.e.*, inconsistent—state law. 29 U.S.C. §218(a). The saving clause is not even implicated

---

[5] The inconsistencies do not end there. The FLSA provides employers greater flexibility concerning paystubs, mealtimes, and payments to terminated employees. Respondent perceives these as gaps in federal law, *see* Resp.Br.48 n.19, but they are just further inconsistencies between the FLSA and California law.

when state and federal law are consistent. And the principal reason the FLSA directs an employer to follow inconsistent state law onshore (a healthy respect for state sovereignty) is wholly inapposite on the OCS, where Congress expressly negated any claim of state sovereignty "for any purpose." 43 U.S.C. §1333(a)(3).[6]

Respondent contends that *Powell* informs the meaning of "inconsistent with" because, in that case, the Court held that two federal wage-and-hour regimes are permissible unless they are "mutually exclusive." Resp.Br.19, 31-32, 46, 49. But as petitioner and the United States have explained, to the extent *Powell* establishes an "impossibility" standard for two competing *federal* laws, that cannot inform the interpretation of §1333(a)(2)(A), because California wage-and-hour law does not become federal law under that provision *unless* it is *first* determined to be "not inconsistent with" federal law. *See* Pet.Br.42 n.9; U.S.Br.27-28. Respondent cannot put the cart before the horse.

Furthermore, *Powell* involved two substantive acts of Congress, each of which underwent rigorous debate and reflected the "hard-fought compromise[s]" associated with bicameralism and presentment. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). No similar claim to congressional consideration can be

---

[6] For the same reason, respondent's reliance on *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980), is misplaced. The Court's conclusion that Congress' novel extension of a federal maritime statute to land-based facilities traditionally regulated by states did not preempt state law reflects precisely the respect for state sovereignty that is wholly misplaced on the OCS.

made for California wage-and-hour law generally, let alone the sleep-time rule recently endorsed in *Mendiola*. Nothing in OCSLA stands as an obstacle to allowing two federal laws embodying national legislative judgments to co-exist. But OCSLA asks a different question: namely, whether Congress would want to adopt state law as surrogate federal law even though it would be at odds with already-promulgated federal law on the same subject. *See* U.S.Br.22-23.

The short answer to that question is no. The FLSA provides a comprehensive statutory scheme in which Congress and federal regulators have provided answers to questions concerning the appropriate federal minimum wage and the proper treatment of sleep time. There is no reason to look to Sacramento for different answers to those same questions when it comes to the OCS. Deference to state judgments makes sense when it comes to labor conditions in that state, and deference to a contrary congressional judgment in a more specific context also makes sense. Taking the extraordinary step of borrowing state law and converting it into federal law to be administered by federal officials just to provide for federal minimum-wage and sleep-time rules at odds with the considered decisions of federal officials makes no sense at all.[7]

---

[7] Respondent's reliance on *Powell* is misplaced for a further reason: The Court's ultimate holding was that, contrary to the Eighth Circuit's judgment, the FLSA applied to the workers' claims, and in reaching that conclusion, the Court relied on the comprehensiveness of the FLSA. *See* 339 U.S. at 516-17. In this case, the very comprehensiveness of the FLSA is a primary

In the end, neither respondent's capacious view of "applicable" nor his cramped view of "inconsistent" is correct, but they cannot *both* be correct without replicating the regime Congress expressly rejected for the OCS. Under his proposed regime, relevant state law applies unless preempted by federal law—which is exactly how state law applies onshore to areas that are *not* federal enclaves. *See* Pet.Br.44; U.S.Br.29-30; *Rodrigue*, 395 U.S. at 358-59. Respondent fully embraces that equivalence, declaring that the same result should obtain "[w]hether onshore or offshore." Resp.Br.49. Insisting on that equivalence even though Congress made clear that all law on the OCS (in contradistinction from onshore) was federal law and that the OCS (in contradistinction from onshore) was to be treated as a federal enclave is to disregard the most basic judgments Congress made in enacting OCSLA.

C. Applying California Wage-and-Hour Law on the OCS Produces Results Congress Never Intended.

Respondent has no credible response to the negative consequences of his effort to routinely export state law to the OCS. Respondent's only answer to creating unnecessary inconsistencies between the rules that govern the OCS in the Gulf and the Pacific is to point out that inconsistencies are inevitable when it comes to gaps in federal law. But pointing out *necessary* inconsistencies in circumstances where federal law is silent is no justification for creating

---

reason why California wage-and-hour law is not "applicable" to the OCS in the first place.

unnecessary disparities when federal law comprehensively regulates the subject matter. Moreover, inconsistencies in statutes of limitations or rules of recoveries for the occasional mishap are far easier to tolerate than ongoing differences in wage-and-hour conditions. Compensating workers on Gulf platforms for an 84-hour work week, while workers on Pacific platforms are paid 24-7, is no small matter.

Respondent largely ignores the anomaly that his position would routinely force federal officials into the strange role of administering state law, even where those same federal officials reached a different conclusion on the same issue. While the federal government identifies this as a real burden, *see* U.S.Br.30-31, respondent suggests that park rangers enforce state and federal laws in National Parks and other federal officials should have the same capabilities when it comes to the OCS. Respondent likely overstates the simplicity of administering the various laws that can apply in the National Parks, which can be a difficult and confusing enterprise—as this Court's recent decision in *Sturgeon* illustrates. *See* No. 17-949, slip op. at 8-9. But in all events, it is one thing to ask a park ranger to enforce federal regulations and the criminal laws of the surrounding jurisdiction. It is quite another thing to ask the Wage and Hour Division in Washington, which has already reached its best judgment as to the proper treatment of sleep time, to administer California law reflecting state officials' conscious decision to reject that judgment. There is simply no reason to thrust federal officials into a difficult and unfamiliar role when federal law already supplies answers.

Relatedly, respondent contends that "if federal officials do not like the application of any particular state standard, the Interior Secretary can issue regulations inconsistent with the state requirements and thereby displace them." Resp.Br.54 (discussing 43 U.S.C. §1334(a)); *see also* Resp.Br.2 (alleging that §1334(a) "authorizes the Interior Secretary to override *any state legal standards applicable on the OCS*" (emphasis added)). That claim appears to overstate the Secretary's authority. The actual statutory provision states: "The Secretary shall administer the provisions of this subchapter *relating to the leasing of* the [OCS]," and "may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper *in order to provide for the prevention of waste and conservation of the natural resources of* the [OCS]." 43 U.S.C. §1334(a) (emphases added). Nothing in that text grants the Interior Secretary freewheeling authority to override state wage-and-hour laws or the whole host of other state laws that would apply as federal law under respondent's theory. *See United States v. Alexander*, 602 F.2d 1228, 1231 (5th Cir. 1979). Moreover, the very prospect that the *Interior* Secretary would need to issue regulations to prevent the *Labor* Department from unnecessarily having to administer a duplicative set of federal *wage-and-hour* laws strongly suggests that respondent's view is not what Congress had in mind.

Adopting the Ninth Circuit's position threatens to empower coastal states to accomplish the one end that Congress plainly sought to foreclose in OCSLA: namely, undermining federal policy when it comes to developing the enormous natural resources on the

OCS. Remarkably, respondent's only response is to concede that California is actively trying to frustrate federal efforts but to point out that, to date, California's efforts have been limited to "doing so through regulation of *on*shore facilities and pipelines, upon which offshore facilities rely." Resp.Br.56. It is hard to imagine a more compelling argument for limiting California's law and efforts to the water's edge (or more precisely, three miles out).

Respondent extols the virtues of the "[s]hore-to-shelf continuity" assured by his position, Resp.Br.51-52; *see also* Resp.Br.7-8, 43, as if Congress would have welcomed that result. But the clear path to "shore-to-shelf" continuity was the one Congress plainly rejected: simply adopting the laws of the adjacent state.[8] There is no reason to revisit that determination after five decades in which employers and employees on the OCS have negotiated mutually beneficial agreements in reliance on those precedents and in full compliance with the FLSA. As *amici* attest, those agreements provide employees with benefits that "generally are far more favorable—including with

---

[8] Respondent emphasizes (at 43) this Court's recognition that Congress attempted to partially accommodate the close relationship between workers on the OCS and adjoining states. *See, e.g.*, *Rodrigue*, 395 U.S. at 363. But that explains only why Congress chose adjacent state law to fill gaps in federal law, and did not adopt admiralty law, which would have looked to the law of the platform owner "for supplementation." *Id.* The preference for adjacent state law was plainly limited to gap-filling, as *Rodrigue* emphasized Congress' rejection of Senator Long's amendment that would have guaranteed true "shore-to-shelf continuity" by making adjacent state law generally applicable. *See id.* at 359.

respect to wages, overtime, and other benefits—than those seen in non-OCS industries." Freeport.Br.24. Respondent's interpretation threatens to overturn those beneficial arrangements and inflict numerous other "cascading collateral consequences" upon employers and employees alike. *Id.* at 30-31. That outcome has nothing to recommend it.[9]

Finally, respondent suggests that his interpretation will save employers from having to keep "two sets of books" for onshore and offshore time. Resp.Br.1, 52. But employers have had little difficulty separating onshore and offshore time, as that division reflects OCSLA's fundamental judgment that California is sovereign onshore, but not on the OCS. The real anomaly would be forcing employers to keep two sets of federal law books, one reflecting federal wage-and-hour law promulgated in Washington and another reflecting law fashioned in Sacramento but adopted as federal law. There is no role on the OCS for that second set of inapplicable and inconsistent state-fashioned rules.

---

[9] Respondent cites an "audit" allegedly demonstrating that some OCS operators "already apply California wage-and-hour laws on the platforms." Resp.Br.55. But the two identified contracts are voluntary arrangements and do not bear on whether many or even most OCS operators follow suit (petitioner does not) or whether voluntary arrangements—which may provide more generous benefits while declining to apply California law, *see, e.g.*, Freeport.Br.23-24—should be overridden by legal fiat.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

RONALD J. HOLLAND
ELLEN M. BRONCHETTI
MCDERMOTT WILL & EMERY LLP
275 Middlefield Road
Suite 100
Menlo Park, CA 94025
(659) 815-7400
rjholland@mwe.com

PAUL D. CLEMENT
Counsel of Record
GEORGE W. HICKS, JR.
LAURA WOLK
KIRKLAND & ELLIS LLP
1301 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 389-5000
paul.clement@kirkland.com

Counsel for Petitioner

April 9, 2019

No. 18-389

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
PETITIONER

v.

BRIAN NEWTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MARK B. STERN
JENNIFER L. UTRECHT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Outer Continental Shelf Lands Act, 43 U.S.C. 1331 *et seq.*, extends federal law to the Outer Continental Shelf (OCS) "to the same extent as if the [OCS] were" a federal enclave, 43 U.S.C. 1333(a)(1). The laws of the adjacent State are "declared to be" federal law to "the extent that they are applicable and not inconsistent with" other federal law. 43 U.S.C. 1333(a)(2)(A). The question presented is whether California wage-and-hour law is "applicable and not inconsistent" with federal wage-and-hour law and therefore "declared to be" federal law on a drilling platform attached to the OCS off the coast of California.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statutory and regulatory provisions involved 1
Statement 2
Summary of argument 7
Argument:
The Fair Labor Standards Act, and not California wage-and-hour law, provides the enforceable federal law on the outer continental shelf 9
A. California wage-and-hour law is not "applicable" to the OCS within the meaning of 43 U.S.C. 1333(a)(2)(a) 10
1. Under OCSLA, state law is "applicable" only if needed to fill a gap in existing federal law 10
2. The meaning of "applicable" adopted by respondent and the court below conflicts with OCSLA's text, context, history, and purpose 20
3. The FLSA leaves no gap to fill, so California wage-and-hour law is not applicable under OCSLA 21
B. California wage-and-hour law is "inconsistent with" federal law under 43 U.S.C. 1333(a)(2)(a) 22
1. The meaning of "not inconsistent with" in Section 1333(a)(2)(A) derives from federal-enclave law 23
2. The California wage-and-hour law governing respondent's claims is inconsistent with the FLSA 26
3. The court of appeals' holding that California law is "not inconsistent with" the FLSA is mistaken 28
C. The decision below would disrupt settled expectations and orderly administration on the OCS 30

Table of Contents—Continued: Page

Conclusion 33
Appendix — Statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases:

Air Terminal Servs., Inc. v. *Rentzel*, 81 F. Supp. 611 (E.D. Va. 1949) 25
American Elec. Power Co. v. *Connecticut*, 564 U.S. 410 (2011) 28
Blackburn v. *United States*, 100 F.3d 1426 (9th Cir. 1996) 25
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 10, 17, 20
Cheyenne-Arapaho Tribes of Oklahoma v. *Oklahoma*, 618 F.2d 665 (10th Cir. 1980) 26
Chicago, Rock Island & Pac. Ry. Co. v. *McGlinn*, 114 U.S. 542 (1885) 12, 13, 23
Continental Oil Co. v. *London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970) ..... *passim*
Department of the Treasury v. *FLRA*, 494 U.S. 922 (1990) 11, 20
Ervin v. *OS Rest. Servs., Inc.*, 632 F.3d 971 (7th Cir. 2011) 29
Genesis Healthcare Corp. v. *Symczyk*, 569 U.S. 66 (2013) 22
Gulf Offshore Co. v. *Mobil Oil Corp.*, 453 U.S. 473 (1981) 10, 11, 14, 17, 18
INS v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) 30
Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 20
LeSassier v. *Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985) 19

Cases—Continued: Page

Lewis v. *United States*,
523 U.S. 155 (1998) ..... *passim*
Mendiola v. *CPS Sec. Solutions, Inc.*,
340 P.3d 355 (Cal. 2015) 27, 31
Mutual Pharm. Co. v. *Bartlett*,
570 U.S. 472 (2013) 29, 30
Nations v. *W. W. Morris*, 483 F.2d 577 (5th Cir.),
cert. denied, 414 U.S. 1071 (1973) 19
Pacific Coast Dairy v. *Department of Agric. of Cal.*,
318 U.S. 285 (1943) 12
Paul v. *United States*, 371 U.S. 245 (1963) 12, 23
Powell v. *United States Cartridge Co.*,
339 U.S. 497 (1950) 27
Ransom v. *FIA Card Servs., N.A.*,
562 U.S. 61 (2011) 11, 13
Rodrigue v. *Aetna Cas. & Sur. Co.*,
395 U.S. 352 (1969) ..... *passim*
Samantar v. *Yousuf*, 560 U.S. 305 (2010) 20
Shell Oil Co. v. *Iowa Dep't of Revenue*,
488 U.S. 19 (1988) 2, 11, 13
Tetra Techs., Inc. v. *Continental Ins. Co.*,
814 F.3d 733 (5th Cir. 2016) 19
United States v. *California*, 332 U.S. 19 (1947) 2
United States v. *Darby*, 312 U.S. 100 (1941) 22
United States v. *Louisiana*, 339 U.S. 699 (1950) 2
United States v. *Maine*, 420 U.S. 515 (1975) 3, 10, 32
United States v. *Sharpnack*, 355 U.S. 286 (1958) 13, 14
United States v. *Texas*, 339 U.S. 707 (1950) 2
Williams v. *United States*,
327 U.S. 711 (1946) 13, 24, 27

Constitution, statutes, regulations, and rules: Page

U.S. Const.:
Art. I, § 8, Cl. 17 12
Art. VI, Cl. 2 (Supremacy Clause) 30
Clean Air Act, 42 U.S.C. 7401 *et seq.* 31
42 U.S.C. 7416 32
42 U.S.C. 7627(a) 32
Clean Water Act, 33 U.S.C 1251 *et seq.* 31
Contract Work Hours and Safety Standards Act,
40 U.S.C. 3701 *et seq.* 31
Deepwater Port Act of 1974, Pub. L. No. 93-627,
§ 19(f), 88 Stat. 2146 14
Fair Labor Standards Act of 1938,
29 U.S.C. 201 *et seq.* 5
29 U.S.C. 206(a)(1) 26, 8a
29 U.S.C. 207(a)(1) 26, 9a
29 U.S.C. 218(a) 28, 9a
Longshore and Harbor Workers' Compensation Act,
33 U.S.C. 901 *et seq.* 31
Outer Continental Shelf Lands Act,
43 U.S.C. 1331 *et seq.* 1, 3
43 U.S.C. 1331(a) 3
43 U.S.C. 1332(1) 1, 3, 10, 31, 1a
43 U.S.C. 1333(a) 14, 15, 3a
43 U.S.C. 1333(a)(1) ..... *passim*, 3a
43 U.S.C. 1333(a)(2) ..... *passim*, 3a
43 U.S.C. 1333(a)(2)(A) ..... *passim*, 3a
43 U.S.C. 1333(a)(3) 4
43 U.S.C. 1334-1354 3
43 U.S.C. 1347 31
Resource Conservation and Recovery Act of 1976,
42 U.S.C. 6901 *et seq.* 31

Statutes, regulations, and rules—Continued: Page

Service Contract Act of 1965, 41 U.S.C. 6701 *et seq.* 31
Submerged Lands Act, 43 U.S.C. 1301 *et seq.* 2
43 U.S.C. 1301-1302 3
43 U.S.C. 1311-1312 3
Walsh-Healey Act, 41 U.S.C. 6501 *et seq.* 27
Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.* 32
18 U.S.C. 13(a) 13, 7a
29 C.F.R. 785.23 ..... 26, 10a
30 C.F.R.:
Ch. II 32
Ch. V 32
33 C.F.R. Ch. I, Subch. N 31
Cal. Lab. Code:
§ 510(a) (West 2011) 27
§ 1182.12(b) (West Supp. 2019) 26

Miscellaneous:

Black's Law Dictionary (10th ed. 2014) 11
Bureau of Ocean Energy Management, *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region (last visited Feb. 27, 2019) 19
Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23 (1953) 2, 3, 14, 15, 16
99 Cong. Rec. (1953):
p. 6963 14
p. 7164 15
pp. 7232-7236 16
p. 7264 15

Miscellaneous—Continued: Page

Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States:
Pt. I (1956) 12
Pt. II (1957) 12, 23, 24, 26
H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess. (1953) 15
H.R. Rep. No. 413, 83d Cong., 1st Sess. (1953) 16
S. Rep. No. 411, 83d Cong., 1st Sess. (1953) 2, 14, 15
S. Rep. No. 1217, 93d Cong., 2d Sess. (1974) 14
Webster's New International Dictionary of the English Language (2d ed. 1958) 11, 13, 21, 23

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
PETITIONER

v.

BRIAN NEWTON

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

The question presented in this case is whether California law prescribing minimum-wage and overtime-pay requirements for employees is incorporated as federal law by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, to govern employment on a drilling platform attached to the Outer Continental Shelf (OCS) off the coast of California. OCSLA places the OCS within the exclusive jurisdiction and control of the United States. 43 U.S.C. 1332(1). The United States accordingly has a substantial interest in the resolution of the question presented.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. The Continental Shelf extends "under the waters of the ocean to the point where the continental slope leading to the true ocean bottom begins." S. Rep. No. 411, 83d Cong., 1st Sess. 4 (1953) (Senate Report). Off the coast of New England, the Shelf "extends seaward about 250 miles." *Ibid.* In the Gulf of Mexico, it "ranges in width from about 40 to about 100 miles." *Ibid.* Along the Pacific Coast, the Shelf "is relatively narrow, ranging in width from 5 miles or less to a maximum of about 40 miles." *Ibid.*

The Continental Shelf "promises enormous riches." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 Stan. L. Rev. 23, 25 (1953) (Christopher). Among other resources, the Shelf is "thought to contain every major mineral, some in large quantities." *Ibid.* Partly for that reason, coastal States and the federal government long disputed "the right to lease the submerged lands for oil and gas exploration." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). In a series of decisions beginning with *United States* v. *California*, 332 U.S. 19 (1947), this Court determined that the United States has exclusive jurisdiction over the Shelf and the mineral deposits therein. *Id.* at 38-39; see *United States* v. *Texas*, 339 U.S. 707, 717-718 (1950); *United States* v. *Louisiana*, 339 U.S. 699, 705 (1950).

In 1953, Congress responded to those decisions by striking a compromise. In the Submerged Lands Act (SLA), 43 U.S.C. 1301 *et seq.*, Congress ceded to the States offshore lands within three nautical miles (or, for Texas and Florida on the Gulf of Mexico, three marine leagues) of their coast, while providing exclusive federal jurisdiction and control over the rest of the Continental

Shelf, 43 U.S.C. 1301-1302, 1311-1312. The exclusively federal portion, known as the Outer Continental Shelf (OCS), "comprises about nine-tenths of the area of the entire Continental Shelf," and spans "some 261,000 square miles * * * , an area almost one-tenth that of the continental United States." Christopher 23, 25.

Later in 1953, Congress passed and President Eisenhower signed the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.* OCSLA defines the OCS to include "all submerged lands" between the lands reserved to the States by the SLA and the edge of the United States' territorial jurisdiction. 43 U.S.C. 1331(a). OCSLA declares that "the subsoil and seabed of the [OCS] appertain to the United States and are subject to its jurisdiction, control, and power of disposition." 43 U.S.C. 1332(1). OCSLA then sets forth a variety of provisions regulating leasing, exploration, and other mechanisms "for the orderly development of offshore resources." *United States* v. *Maine*, 420 U.S. 515, 527 (1975); see 43 U.S.C. 1334-1354.

Of central importance here, OCSLA "define[s] a body of law applicable to the seabed, the subsoil, and the fixed structures such as [drilling platforms]" attached to the OCS. *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). First, in 43 U.S.C. 1333(a)(1), OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States" to the "subsoil and seabed" of the OCS, as well as to "all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed." Section 1333(a)(1) provides that such federal law shall apply "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State," *i.e.*, a federal enclave. *Ibid.*; see *Rodrigue*, 395 U.S. at 355.

Section 1333(a)(2)(A) then provides that "[t]o the extent that they are applicable and not inconsistent with" federal law, "the civil and criminal laws of each adjacent State * * * are declared to be the law of the United States for that portion of the" OCS "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the [OCS]." 43 U.S.C. 1333(a)(2)(A). Section 1333(a)(2)(A) provides that "[a]ll of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States," and that "State taxation laws shall not apply to the outer Continental Shelf." *Ibid.* Section 1333(a)(3) adds that the "adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the" OCS. 43 U.S.C. 1333(a)(3).

2. From January 2013 to January 2015, respondent worked for petitioner on drilling platforms attached to the OCS in the Santa Barbara Channel. Pet. App. 2-3. As is standard for employees on such platforms, respondent worked 14-day shifts, referred to as "hitches." *Id.* at 3. During shifts, respondent spent 12 hours per day on duty, for which he was paid "well above" the state and federal minimum wage. *Id.* at 3, 20. He spent the other 12 hours per day on "controlled standby," during which "he was not able to leave the platform." *Id.* at 3. He was not paid for that standby time. *Id.* at 47.

In February 2015, respondent filed a putative class action in California state court alleging violations of several state wage-and-hour laws, as well as associated state-law violations. Pet. App. 3. Among other things, respondent claimed that California's minimum-wage

and overtime statutes and accompanying administrative orders required petitioner to compensate him for the 12 hours he spent on controlled standby. *Ibid.*

3. Petitioner removed the action to a federal district court, which granted judgment on the pleadings to petitioner. Pet. App. 3-4. The court explained that, under OCSLA, "the law to be applied * * * is exclusively federal," but "the law of an adjacent state may be adopted as the law of the United States to the extent that [it] is 'applicable and not inconsistent' with" existing federal law. *Id.* at 51 (quoting 43 U.S.C. 1333(a)(2)(A)). The court further explained that "state law is only 'applicable' to the extent that federal law, because of its limited function in a federal system and inadequacy to cope with the full range of potential legal problems, has a significant void or gap." *Ibid.* (citing *Rodrigue*, 395 U.S. at 357). Thus, the court determined, "under OCSLA, federal law governs and state law only applies to the extent it is necessary 'to fill a significant void or gap' in federal law." *Ibid.* (quoting *Continental Oil Co.* v. *London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970)).

Turning to respondent's claims, the district court concluded that the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, constitutes a "comprehensive [federal] scheme providing for minimum wages and overtime pay." Pet. App. 55 (citation omitted). Because the FLSA has no "'significant voids or gaps'" that need to be filled by state law, the court explained that "it is not necessary to apply the law of the 'adjacent state'" under OCSLA. *Ibid.*; see *id.* at 52-59. The court granted judgment to petitioner on respondent's claims, all of which were based on California law. *Id.* at 60.

4. The court of appeals reversed. Pet. App. 1-41. The court rejected the district court's conclusion that a "significant void or gap" in federal law is required before state law can be applied as federal law under OCSLA. *Id.* at 2 (quoting *Continental Oil*, 417 F.2d at 1036). Instead, the Ninth Circuit determined that state law is "'applicable'" under OCSLA whenever it "pertain[s] to the subject matter at hand." *Id.* at 21. The court acknowledged that its reading of "applicable" conflicted with the Fifth Circuit's decision in *Continental Oil* and the decision of every district court within the Ninth Circuit that had addressed the issue. *Id.* at 2, 20 n.13 (citation omitted).

Having concluded that California wage-and-hour law was "'applicable'" under OCSLA, the court of appeals turned to whether California law was "'inconsistent with' existing federal law." Pet. App. 27 (quoting 43 U.S.C. 1333(a)(2)(A)). The court reasoned that state laws are "inconsistent" with federal law under OCSLA only "if they are mutually incompatible, incongruous, or inharmonious." *Id.* at 28 (citation and internal quotation marks omitted). Under that standard, the court determined that no inconsistency exists between the FLSA and California wage-and-hour law, because the FLSA savings clause "explicitly permits more protective state wage and hour laws." *Id.* at 36. The court accordingly held that California law applied and remanded for further proceedings on respondent's minimum-wage and overtime claims. *Id.* at 39.[1]

---

[1] The court of appeals directed the district court to consider in the first instance whether respondent's other claims were inconsistent with federal law. Pet. App. 40. The court of appeals also reserved for the district court on remand "the question whether [its] holding should be applied retrospectively." *Id.* at 43.

SUMMARY OF ARGUMENT

In OCSLA, Congress extends federal law to the OCS "to the same extent as if the [OCS] were" a federal enclave, 43 U.S.C. 1333(a)(1), and adopts state law as federal law to the extent it is "applicable and not inconsistent with" existing federal law, 43 U.S.C. 1333(a)(2)(A). The FLSA extends to the OCS and prescribes minimum-wage, overtime, and maximum-hour standards that directly address respondent's claims. That resolves this case. Because the FLSA supplies the "applicable" federal law, California law cannot. And even if California law were "applicable" in some sense, it would not be adopted as federal law under OCSLA because it is "inconsistent" with the FLSA.

A. Under OCSLA, only federal law applies on the OCS. That law comes, first and foremost, from the "Constitution and laws * * * of the United States," including the FLSA. 43 U.S.C. 1333(a)(1). Because federal law does not address every possible issue that could arise on the OCS, however, OCSLA borrows "applicable" and "not inconsistent" state law. 43 U.S.C. 1333(a)(2)(A). But just as in federal enclaves—the jurisdictional model OCSLA expressly adopts—state law is "applicable" only if federal law leaves a gap to fill. Here, there is no gap. Because the FLSA prescribes standards that govern respondent's claims, the FLSA provides the only "applicable" federal law.

The text, structure, history, and purpose of OCSLA all reinforce that reading. The term "applicable," while capable of various definitions in isolation, takes its meaning in OCSLA from the well-established law governing federal enclaves, under which state law applies only when federal law leaves a gap. This Court's deci-

sions construing OCSLA, along with the most significant aspects of its legislative history, similarly indicate that state law applies only when federal law does not. That important but secondary role also follows from OCSLA's overriding purpose—to make federal law "'exclusive' in its regulation of" the OCS, with state law "adopted only as surrogate federal law." *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969).

B. Even if California wage-and-hour law were "applicable" in some sense, OCSLA would not adopt it as federal law because it is "inconsistent with" the FLSA. 43 U.S.C. 1333(a)(2)(A). Under established principles of federal-enclave law, state law that is inconsistent with federal law or policy is not assimilated. Such inconsistency is most apparent when adopting state law would effectively revise standards prescribed by federal law. That is what respondent seeks to do here, by imposing wage-and-hour standards that differ from those prescribed by the FLSA.

To be sure, the FLSA contains a savings clause that requires employers to comply with laws that provide greater protections for employees. The FLSA would accordingly not preempt California law if this case arose under state jurisdiction on the mainland. But preemption principles are irrelevant under OCSLA, because state law never applies of its own force on the OCS. Under OCLSA, the only question is whether California law is "declared to be" federal law. 43 U.S.C. 1333(a)(2)(A). Because California's minimum-wage and maximum-hours standards are "inconsistent with" those prescribed by the FLSA, the answer is no. *Ibid.*

C. The decision below departs from the Fifth Circuit's position for half a century that OCSLA adopts state law on the OCS only to fill gaps in federal law.

Subjecting OCS employers to the wage-and-hour requirements of various adjacent States would disrupt settled expectations and require substantial changes to business arrangements. Assimilating new swaths of state law would also multiply the burdens on federal officials charged with "administer[ing]" and "enforc[ing]" all law on the OCS. 43 U.S.C. 1333(a)(2)(A). And the consequences could extend beyond the wage-and-hour laws at issue here. Many other federal statutes, administered by various federal agencies, regulate activity on the OCS. Although many of those statutes indicate that federal law applies exclusively on the OCS, the decision below could provide a rationale to urge the adoption of state regulatory law in disruptive and unpredictable ways—all in conflict with OCSLA's core directive that federal law is paramount on the OCS.

ARGUMENT

THE FAIR LABOR STANDARDS ACT, AND NOT CALIFORNIA WAGE-AND-HOUR LAW, PROVIDES THE ENFORCEABLE FEDERAL LAW ON THE OUTER CONTINENTAL SHELF

OCSLA provides that the "laws * * * of the United States are extended to" the OCS. 43 U.S.C. 1333(a)(1). The FLSA is undisputedly among those laws. California law can serve as federal law on the OCS only if it is "applicable" and "not inconsistent with" the FLSA. 43 U.S.C. 1333(a)(2)(A). The California wage-and-hour law invoked by respondent does not satisfy either of those requirements. It is not "applicable" because the FLSA leaves no gap for state law to fill, and it is "inconsistent with" the FLSA because it would impose different minimum-wage and overtime requirements than Congress directly prescribed. *Ibid.* The decision below should be reversed on either or both of those grounds.

A. California Wage-And-Hour Law Is Not "Applicable" To The OCS Within The Meaning Of 43 U.S.C. 1333(a)(2)(A)

The text and structure of OCSLA, its legislative history and purpose, and this Court's precedent all indicate that state law is "applicable" as federal law on the OCS only "to fill * * * substantial 'gaps' in the coverage of federal law." *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480 (1981); see *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 101 (1971); *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357-359 (1969). Where laws of the United States apply of their own force, there is no gap to fill and thus no need to adopt "state law * * * as surrogate federal law." *Rodrigue*, 395 U.S. at 357. That is the case here. The FLSA comprehensively regulates wage-and-hour issues and leaves "no gaps" for state law to fill. *Continental Oil Co.* v. *London Steam-Ship Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), cert. denied, 397 U.S. 911 (1970).

1. Under OCSLA, state law is "applicable" only if needed to fill a gap in existing federal law

OCSLA "emphatically" asserts the federal government's "paramount" sovereignty over the OCS. *United States* v. *Maine*, 420 U.S. 515, 526 (1975). OCSLA provides that the United States has exclusive "jurisdiction, control, and power of disposition" over OCS lands, 43 U.S.C. 1332(1), and Section 1333(a)(1) extends the "Constitution and laws * * * of the United States" to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State," 43 U.S.C. 1333(a)(1). Because those federal laws "might be inadequate to cope with the full range of legal problems" arising on the OCS, *Rodrigue*, 395 U.S. at 357, Section 1333(a)(2) provides that "the civil and criminal laws of each adjacent State * * * are declared to

be the law of the United States" on the OCS "[t]o the extent that they are applicable and not inconsistent with" federal law, 43 U.S.C. 1333(a)(2)(A). Thus, "[a]ll law applicable to the [OCS] is federal law," *Gulf Offshore*, 453 U.S. at 480, with "state law * * * adopted only as surrogate federal law," *Rodrigue*, 395 U.S. at 357, and only as specified in Section 1333(a)(2).

a. The text and context of OCSLA establish that state law is "applicable" as federal law on the OCS under Section 1333(a)(2) only when there is a gap in the laws of the United States that are "extended" to the OCS by Section 1333(a)(1). As a matter of ordinary meaning, both at the time of OCSLA's adoption and now, a law is "applicable" if it is "[c]apable of being applied" or "fit, suitable, or right to be applied." *Webster's New International Dictionary of the English Language* 131 (2d ed. 1958) (*Webster's Second*); see *Ransom* v. *FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011) (quoting multiple dictionaries providing the same definition); *Black's Law Dictionary* 120 (10th ed. 2014) (same).

Determining whether a law is "applicable" under that definition requires analyzing the statutory context. See *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (explaining, in interpreting Section 1333(a)(2), that "the meaning of words depends on their context"); see also *Ransom*, 562 U.S. at 70-71 (relying on "statutory context" to interpret "'applicable'"); *Department of the Treasury* v. *FLRA*, 494 U.S. 922, 930 (1990) (similar). Here, the critical context for the meaning of "applicable" in Section 1333(a)(2) comes from Section 1333(a)(1), which extends federal law to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State"—*i.e.*, "an upland federal enclave." *Rodrigue*, 395 U.S. at 357.

When Congress enacted Section 1333(a)(1), choice-of-law principles governing federal enclaves were well-established. The Constitution empowers Congress to "exercise exclusive legislation" in federal enclaves, such as military reservations, post offices, and parks. U.S. Const. Art. I, § 8, Cl. 17; see *Jurisdiction over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction over Federal Areas Within the States*, Pt. I, at 2 (1956) (Federal Study). When a federal enclave is created within a State, any existing state "laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the [federal] government" are "at once displaced." *Chicago, Rock Island & Pac. Ry. Co.* v. *McGlinn*, 114 U.S. 542, 546 (1885). The only state laws that apply as federal law in the new enclave are those "in no respect inconsistent with any law of the United States," and that Congress "never * * * changed or abrogated." *Id.* at 547; see *Paul* v. *United States*, 371 U.S. 245, 269 (1963) (explaining that a preexisting state law is "applicable" in a federal enclave when "there is no conflicting federal policy"). Any state law enacted "after the transfer of sovereignty" is "without application" unless adopted by the federal government. *Pacific Coast Dairy* v. *Department of Agric. of Cal.*, 318 U.S. 285, 294-295 (1943). In sum, state law applies to a federal enclave only to "fill[] a vacuum which would otherwise exist in the absence of" federal law. Federal Study, Pt. II, at 158 (1957).

Against that background, OCSLA's provision that state laws are adopted as federal law "[t]o the extent they are applicable and not inconsistent" with federal law, 43 U.S.C. 1333(a)(2)(A), is best understood to follow the federal-enclave model that Congress expressly

specified in Section 1333(a)(1). See *Shell Oil*, 488 U.S. at 26 ("[r]eading the statutory provisions" in Section 1333(a)(2)(A) "in the context of the entire section in which they appear") (emphasis omitted). Just as state law applies in federal enclaves only to fill gaps in federal law, see *McGlinn*, 114 U.S. at 547, so too state law is "applicable" on the OCS only to "supplement[] gaps in the federal law," *Rodrigue*, 395 U.S. at 357.

Congress's adoption of state law to fill gaps in federal law on the OCS—*i.e.*, when it is "fit, suitable, or right to be applied," *Webster's Second* 131, or "appropriate," *Ransom*, 562 U.S. at 69-70, for that purpose—also follows from its longstanding practice of assimilating state criminal law to "fill in gaps" in federal law on federal enclaves. *Williams* v. *United States*, 327 U.S. 711, 719 (1946). Beginning in 1825, Congress enacted a series of Assimilative Crimes Acts that "made applicable to enclaves the criminal laws in force in the respective States," but did not incorporate crimes "punishable by any enactment of Congress." *United States* v. *Sharpnack*, 355 U.S. 286, 291, 293 (1958); see 18 U.S.C. 13(a). Those statutes thus "borrow[ed] state law to fill gaps in the federal criminal law," but not where "there [wa]s no gap to fill." *Lewis* v. *United States*, 523 U.S. 155, 160, 163 (1998). Given Congress's adoption of the federal-enclave model in OCSLA, its longstanding practice of making state criminal law "applicable on federal enclaves" only to "fill gaps" in federal law, strongly indicates that Section 1333(a)(2) similarly makes state law "applicable" on the OCS only to "fill in gaps" in federal law. *Id.* at 159.

Congress's subsequent treatment of Section 1333(a)(2) further reinforces the connection between OCSLA and the Assimilative Crimes Act. OCSLA initially provided

for incorporation of state law only as of the effective date of OCSLA's enactment, because Congress believed prospective incorporation of state laws might be an unconstitutional delegation of legislative authority. See Senate Report 33. After this Court held that the Assimilative Crimes Act could fill gaps in federal law by prospectively incorporating state law, *Sharpnack*, 355 U.S. at 294, Congress amended Section 1333(a)(2) to adopt "applicable" state law then in effect or later enacted, Deepwater Port Act of 1974, Pub. L. No. 93-627 § 19(f), 88 Stat. 2146; see S. Rep. No. 1217, 93d Cong., 2d Sess. 60, 76 (1974). That conscious decision to link state law made "applicable" on the OCS through OCSLA to state criminal law made applicable on federal enclaves through the Assimilative Crimes Act further underscores that state law in both statutes is "applicable" only to "fill gaps in" federal law. *Lewis*, 523 U.S. at 160; *Gulf Offshore*, 453 U.S. at 479 n.7.

b. The legislative history and purpose of OCSLA further indicate that state law is "applicable" under Section 1333(a)(2) only to fill gaps in federal law. "In introducing the bill to the Senate," Acting Interior Committee Chairman Cordon explained that OCSLA created a "legal situation [that] is comparable to that in" federal enclaves. *Rodrigue*, 395 U.S. at 361-362 (quoting 99 Cong. Rec. 6963 (1953)).[2] Consistent with that understanding, the Senate Committee Report summarized the "body of law * * * extended to the" OCS by Section 1333(a) as "consisting of: (*a*) The Constitution and the laws * * * of the Federal Government; (*b*) the

---

[2] As one commentator has explained, "Senator Cordon's superior knowledge of the structure and details of the bill * * * made him an important figure" in enacting OCSLA. Christopher 32.

regulations, rules, and operating orders of the Secretary of the Interior; and (c) "*in the absence of such applicable Federal law* or adequate Secretarial regulation, the civil and criminal laws of the State adjacent to the" OCS. Senate Report 2 (emphasis added). Likewise, Senator Anderson, a member of the Conference Committee, explained that Section 1333(a) "provides that Federal laws and regulations shall be applicable in the [OCS], but that *where there is a void*, the State law may be *applicable*." *Rodrigue*, 395 U.S. at 358 (quoting 99 Cong. Rec. 7164 (1953)) (emphases added). And Senator Daniel explained that OCSLA "applied State laws in the fields which *are not covered by Federal laws* or by regulations of the Secretary of the Interior." 99 Cong. Rec. 7264 (1953) (emphasis added).[3]

Opponents of OCSLA "realized full well that state law was being used only to supplement federal law," and "introduced an amendment to the Act which would have made 'the laws of such State applicable to the newly acquired area, and * * * the officials of such State [empowered] to enforce the laws of the State in the newly acquired area.'" *Rodrigue*, 395 U.S. at 358-359 (citing 99 Cong. Rec. 7232-7236). But Congress expressly "rejected" that proposal. *Id.* at 359. Congress likewise rejected the approach of the House bill, under which state laws would have been made "applicable" of their own force on the OCS "[e]xcept to the extent that they are inconsistent with applicable Federal laws." H.R. Rep.

---

[3] "Particular weight also attaches to the comments of Senator Clinton Anderson * * * , who was the informal leader of the Committee Democratic minority, and of Senator Price Daniel [of Texas], who represented a state having a great stake in the controversy." Christopher 32.

No. 413, 83d Cong., 1st Sess. 9 (1953). Congress's decision to replace that approach with the federal-enclave model, see Christopher 41, underscores that federal law applies exclusively on the OCS (as on federal enclaves), with state laws incorporated as federal law only "to the extent" they are "applicable"—*i.e.*, suitable or appropriate—to fill gaps, 43 U.S.C. 1333(a)(2)(A).[4]

c. This Court's precedents interpreting OCSLA further reinforce that conclusion.

This Court first interpreted OCSLA's choice-of-law provision in *Rodrigue*. The Court there considered whether wrongful-death suits brought by the families of men killed on OCS drilling rigs off the coast of Louisiana should proceed under federal admiralty law or a state wrongful-death statute. See 395 U.S. at 352-353. The Court explained that Congress enacted OCSLA to provide a single "body of law applicable to the" OCS, and that "this law was to be federal law of the United States, applying state law only as federal law and then only when not inconsistent with applicable federal law." *Id.* at 355-356. Relying on "the language of the Act," the Court further explained that "federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems," so "the Act *supplemented gaps in the federal law* with state law through the 'adoption of State law as the law of the United States.'" *Id.* at 356-357

---

[4] To be sure, some statements in the legislative history can be read to support the position adopted below. See, *e.g.*, Pet. App. 25-26; H.R. Conf. Rep. No. 1031, 83d Cong., 1st Sess. 13 (1953). But the repeated congressional emphasis on state law as a means to fill gaps in federal law, along with the rejection of proposals to apply state law directly, indicate that OCSLA envisioned only a secondary role for state law.

(emphasis added). The Court concluded that it was "evident from this that federal law is 'exclusive' in its regulation of this area, and that state law is adopted only as surrogate federal law." *Id.* at 357. Because the Court concluded that federal admiralty law did not apply to the OCS, it adopted the state wrongful-death statute to govern the claim. *Id.* at 366.

Two years later, the Court again interpreted OCSLA's choice-of-law provision in *Huson*. There, the question was whether the federal admiralty doctrine of laches or a state statute of limitations governed a tort action arising from an injury on the OCS. 404 U.S. at 98-99. The Court observed that *Rodrigue* had "clarified the scope of application of federal law and state law under" OCSLA. *Id.* at 101. Specifically, the Court explained that *Rodrigue* concluded that "comprehensive admiralty law remedies" did not apply to the OCS, that "a substantial 'gap' in federal law" therefore exists, and that "the 'gap' must be filled with the applicable body of state law under" Section 1333(a)(2). *Ibid.* After describing state limitations law, the Court explained that OCSLA incorporated state law only "for *filling in the 'gaps'* in federal law." *Id.* at 103-104 (emphasis added). Because Congress's decision not to apply federal admiralty law to the OCS left such a gap, the Court adopted state law as federal law under OCSLA. *Id.* at 105.

The Court again discussed OCSLA's choice-of-law provision in *Gulf Offshore*. There, the question was whether federal courts have exclusive jurisdiction over cases arising under OCSLA. 453 U.S. at 475. In analyzing OCSLA's jurisdictional scheme, the Court explained that "[a]ll law applicable to the [OCS] is federal law, but *to fill the substantial 'gaps'* in the coverage of

federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Id.* at 480 (emphasis added) (quoting 43 U.S.C. 1333(a)(2)). The Court added that OCSLA incorporated the "law of adjacent States *to fill gaps in federal law*" to "retain exclusive federal control of the administration of the" OCS, while also recognizing "the close, longstanding relationship between the Shelf and the adjacent States." *Id.* at 480 n.7 (emphasis added).[5]

d. Although this Court has not addressed a case in which existing federal law extended to the OCS left no gap, the logic of its decisions leads to the conclusion that state law would not apply under Section 1333(a)(2) in such a scenario. As explained in *Rodrigue*, OCSLA makes federal law "exclusive," with "state law * * * adopted *only* as surrogate federal law." 395 U.S. at 357 (emphasis added).

The Fifth Circuit adopted that reading of OCSLA a half-century ago in *Continental Oil*. The court there applied OCSLA's choice-of-law provision to an action by an OCS drilling platform operator against the owner of an ocean-going vessel that collided with the platform. 417 F.2d at 1032-1033. Unlike the wrongful-death action in *Rodrigue*, which fell outside federal admiralty jurisdiction, the involvement of the ocean-going vessel in the collision brought the claim in *Continental Oil* undisputedly within federal admiralty law. See *id.* at 1035.

---

[5] As with the legislative history, some statements in this Court's decisions can be read to support a different interpretation. See, *e.g.*, *Rodrigue*, 395 U.S. at 359 (referring to the potential for "federal law to oust adopted state law"); *id.* at 356-358 (referring to adoption of state law "not inconsistent" with federal law). But the decisions as a whole strongly indicate that state law is applicable as federal law on the OCS only to fill gaps in existing federal law.

The platform owner contended that state law was nevertheless "applicable" under Section 1333(a)(2) because it was relevant to "the subject matter in question." *Ibid.* The Fifth Circuit rejected that position as irreconcilable with the statute. The court explained that Congress's "deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap." *Id.* at 1036 (footnote omitted). The contrary view, under which "applicable" simply meant "applicable to the subject matter in question," would effectively read the word out of the statute by placing "almost 100% [e]mphasis on the 'not inconsistent * * * with federal laws' element of § 1333(a)(2)." *Id.* at 1035. Because the court concluded that there were "no gaps" to fill under federal admiralty law, the court concluded that there was no "necessity" to adopt state law as federal law under OCSLA. *Id.* at 1036.

Over the past 50 years, the Fifth Circuit—the site of the vast majority of OCS energy exploration—has repeatedly reaffirmed the holding of *Continental Oil*. See, *e.g.*, *Tetra Techs., Inc.* v. *Continental Ins. Co.*, 814 F.3d 733, 738 (2016) (per curiam); *LeSassier* v. *Chevron USA, Inc.*, 776 F.2d 506, 509 (1985) (per curiam); *Nations* v. *W. W. Morris*, 483 F.2d 577, 585, cert. denied, 414 U.S. 1071 (1973); see also Bureau of Ocean Energy Management, *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region (noting that "about 97% of all OCS oil and gas production" occurs in the Gulf of Mexico). District courts within the Ninth Circuit have likewise uniformly followed the reasoning of *Continental Oil*. See Pet. App. 20 n.13; see also *id.* at 51-52 (district court in this case applying *Continental Oil*).

The decision below appears to be the first to depart from that long-settled understanding of OCSLA.

2. The meaning of "applicable" adopted by respondent and the court below conflicts with OCSLA's text, context, history, and purpose

The court of appeals interpreted "applicable" to mean "pertain[ing] to the subject matter at hand," a definition it said "does not lend itself to the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." Pet. App. 21. Respondent defends that approach. Cert. Br. 17. Although the Ninth Circuit's reading might be one possible meaning of the word "applicable" in isolation, this Court does not "construe statutory phrases in isolation" but rather "read[s] statutes as a whole." *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted).

In context, respondent's reading of "applicable" to mean "pertain[ing] to the subject matter at hand" gives the word no meaning. Pet. App. 21. Even without the word "applicable," no one would read OCSLA to require incorporation of *irrelevant* state law—*i.e.*, divorce law in a personal-injury action. The limitation proposed by respondent and the Ninth Circuit is thus no limitation, and fails to "give effect to every word of a statute wherever possible." *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 (2004); see *FLRA*, 494 U.S. at 930 (refusing to read the term "applicable laws" as "a pointless tautology").

Reading "applicable" to mean "pertain[ing] to the subject matter at hand," Pet. App. 21, also conflicts with this Court's precedent. In both *Rodrigue* and *Huson*, there was no dispute that the Louisiana law invoked by the respective plaintiffs pertained to the subject matter at hand. The Court nevertheless analyzed at length whether federal admiralty law applied, see *Huson*,

404 U.S. at 100-105; *Rodrigue*, 395 U.S. at 359-366—an inquiry that would have been unnecessary if any state law pertaining to the same subject matter were "applicable" under Section 1333(a)(2)(A).

Finally, the Ninth Circuit's reasoning makes little sense on its own terms. The court of appeals recognized that state law adopted as federal law under OCSLA is "surrogate federal law." Pet. App. 21. But the concept of state law as "surrogate federal law" recognizes that state law takes on the role of federal law only when existing federal law is unavailable to play that role itself. See, *e.g.*, *Webster's Second* 2540 (defining a "surrogate" as a "substitute"). The suggestion that state law could substitute for federal law even if federal law were "applicable" cannot be squared with ordinary language or the principle of federal exclusivity that runs throughout OCSLA. See *Rodrigue*, 395 U.S. at 357. The only meaning of "applicable" that makes sense of OCSLA's text, structure, history, and purpose is the one adopted by the Fifth Circuit a half-century ago and followed without exception until the decision below: State law is "applicable"—that is, suitable or appropriate—on the OCS only to fill a "void or gap" in existing federal law. *Continental Oil*, 417 F.2d at 1036.

3. The FLSA leaves no gap to fill, so California wage-and-hour law is not applicable under OCSLA

Applying that rule to this case, the FLSA is the only law applicable to respondent's claims. There is no dispute that the FLSA is among the "laws * * * of the United States" that are "extended to the" OCS by Section 1333(a)(1). See Pet. App. 27; see also *Rodrigue*, 395 U.S. at 362 (indicating that Congress drafted OCSLA to ensure that "fair-labor standard laws" would extend to the OCS) (citation omitted). And the FLSA

does not leave any "gaps" that would need to be filled by state law acting as "surrogate federal law." *Rodrigue*, 395 U.S. at 357.

As this Court has long explained, the FLSA is a "comprehensive legislative scheme," *United States* v. *Darby*, 312 U.S. 100, 109 (1941), that establishes, *inter alia*, "federal minimum-wage, maximum-hour, and overtime guarantees," *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 69 (2013); see p. 26, *infra*. The FLSA thus addresses respondent's minimum-wage and overtime claims. California wage-and-hour law is therefore not "applicable" within the meaning of Section 1333(a)(2). And because Section 1333(a)(2) adopts state law as federal law only when state law is both "applicable *and* not inconsistent with" existing federal law, 43 U.S.C. 1333(a)(2)(A) (emphasis added), the inapplicability of state law alone means that the Ninth Circuit erred in adopting California wage-and-hour law to resolve respondent's minimum-wage and overtime claims. This Court can reverse on that basis alone.

B. California Wage-and-Hour Law Is "Inconsistent With" Federal Law Under 43 U.S.C. 1333(a)(2)(A)

Even if California wage-and-hour law were "applicable" within the meaning of Section 1333(a)(2)(A), it would not be adopted as federal law under OCSLA because it is "inconsistent with" the FLSA. 43 U.S.C. 1333(a)(2)(A). Contrary to the decision below, the standard for "inconsisten[cy]" set by OCSLA does not mirror ordinary conflict-preemption principles, which govern in deciding whether federal law ousts state law that would otherwise apply of its own force to a matter within the State's jurisdiction. The standard under OCSLA instead concerns whether state law is affirmatively incorporated as federal law in an area of exclusive

federal jurisdiction. Under OCSLA, California wage-and-hour laws cannot be incorporated to impose minimum-wage and overtime requirements different from those Congress specified in the FLSA. Congress has already created one federal law on the issue; OCSLA provides no basis to adopt another. The decision below should be reversed on that basis as well.

1. The meaning of "not inconsistent with" in Section 1333(a)(2)(A) derives from federal-enclave law

Like the term "applicable," the term "not inconsistent" has a general definition—"incompatible; incongruous; inharmonious," *Webster's Second* 1259—that must be understood within the context of OCSLA. And as with the term "applicable," the relevant context is the well-established law of federal enclaves that Congress expressly referenced in Section 1333(a)(1).

As noted above, federal-enclave law allows incorporation of state law only if it preexisted establishment of the enclave, and only if it is not "inconsistent with any law of the United States" or "in conflict with the political character, institutions, and constitution of the [federal] government." *McGlinn*, 114 U.S. at 546-547; see Federal Study, Pt. II, at 159-163. As *McGlinn* suggests, the standard for inconsistency is broader than pure legal conflict. A state law is inconsistent with federal law if there exists "conflicting federal policy." *Paul*, 371 U.S. at 269.

The standard for inconsistency in federal-enclave law has developed primarily through interpretation of the Assimilative Crimes Act and its predecessors, which have long provided for state law to fill gaps in federal criminal law on federal enclaves. See *Lewis*, 523 U.S. at 160-161. Although those Acts have not expressly provided that adopted state laws may not be incorporated

if "inconsistent with" federal law, this Court has long interpreted them to contain such a limitation. See *id.* at 164-165. In *Lewis*, for example, the Court explained that state criminal law may not be assimilated as federal law if it "would interfere with the achievement of a federal policy," if adoption of "state law would effectively rewrite" federally prescribed and "carefully considered" standards, or if "federal statutes reveal an intent to occupy so much of a field as would exclude use of the particular state statute at issue." *Ibid.*

Of particular relevance here, this Court has emphasized that assimilation of state law is inappropriate when Congress has defined a crime with precision. More than 70 years ago in *Williams*, for example, the Court refused to assimilate an Arizona crime because Congress had defined "the precise acts" the defendant committed to constitute a different federal crime. 327 U.S. at 717. The Court reached that result even though federal law did not expressly foreclose Arizona's definition and would not have preempted a state prosecution under the State's ordinary jurisdiction. The Court explained that, in the context of a federal enclave governed exclusively by federal law, Congress's precise definition of a crime "is not to be redefined and enlarged by application" of state law, because such a redefinition would have the impermissible "effect of modifying or repealing existing provisions of the Federal Code." *Id.* at 717-718. The Court reiterated that principle in *Lewis*, explaining that assimilation of state law "may not rewrite distinctions among the forms of criminal behavior that Congress intended to create." 523 U.S. at 165; accord Federal Study, Pt. II, at 132.

Those considerations apply *a fortiori* to OCSLA. Unlike the Assimilative Crimes Act, OCSLA's text expressly includes a "not inconsistent with" standard. 43 U.S.C. 1333(a)(2)(A). Unlike most newly established federal enclaves, moreover, the OCS was never part of a State, so no reliance interests on preexisting state law could have developed. Considerations of state sovereignty likewise play no role on the OCS, because (unlike with many federal enclaves) States have never exercised sovereign control over the land at issue.

To be sure, it may be relatively rare that a state law could be "applicable" in the sense that federal law leaves a gap to fill yet "inconsistent with" other federal law. See *Continental Oil*, 417 F.2d at 1040. But such a scenario is conceivable, so—unlike in respondent's reading—neither term is rendered superfluous. See *id.* at 1037. For example, state law may be "applicable" because federal law does not address a particular issue, but "inconsistent" with federal law because it "interfere[s] with the achievement of a federal policy" on a broader level. *Lewis*, 523 U.S. at 164. Thus, a federal court declined to assimilate on a federal enclave a Virginia criminal law that banned racial integration in "places of public assemblage"—a crime with no counterpart in the federal code—because the law conflicted with federal policy "prohibiting the maintenance of racial segregation." *Air Terminal Servs., Inc.* v. *Rentzel*, 81 F. Supp. 611, 611 (E.D. Va. 1949); see Federal Study, Pt. II, at 135-136 (discussing this case). Federal courts of appeals have similarly declined to assimilate state criminal laws that could be seen as filling gaps in federal criminal law but that would undermine, *inter alia*, "Congress's policy and purpose in establishing" national parks, *Blackburn* v. *United States*, 100 F.3d 1426,

1435 (9th Cir. 1996), or federal policy protecting "Indian hunting and fishing rights," *Cheyenne-Arapaho Tribes of Oklahoma* v. *Oklahoma*, 618 F.2d 665, 668 (10th Cir. 1980). Moreover, just as state laws can be "applicable" but "inconsistent," so too state laws can be inapplicable but substantively consistent—for example, a state law that parrots the wage-and-hour standards of the FLSA. 43 U.S.C. 1333(a)(2)(A). By barring adoption of state laws that are *either* not "applicable" *or* "inconsistent with" federal law, OCSLA preserves the primacy of federal law and protects the federal government's paramount interests on the OCS. *Ibid.*

2. The California wage-and-hour law governing respondent's claims is inconsistent with the FLSA

The California wage-and-hour laws that respondent invokes are "inconsistent with" the FLSA under Section 1333(a)(2)(A). The FLSA generally requires employers to pay a minimum hourly wage of $7.25, 29 U.S.C. 206(a)(1), and time-and-a-half at the employer's regular rate for work in excess of 40 hours in a week, 29 U.S.C. 207(a)(1). In addition, Department of Labor regulations provide that "[a]n employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises." 29 C.F.R. 785.23. The California laws that respondent invokes depart from those federal standards. California requires most employers to pay a minimum hourly wage of $12, see Cal. Lab. Code § 1182.12(b) (West Supp. 2019); mandates time-and-a-half pay for "[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek," and double pay for "[a]ny work in excess of 12 hours in one day" or "any

work in excess of eight hours on any seventh day of a workweek," Cal. Lab. Code § 510(a) (West 2011); and has been interpreted to require employers in certain industries (including those at issue here) to pay personnel residing on the employer's premises for all hours on call, including those "engaged in personal activities, including sleeping, showering, eating, reading, watching television, and browsing the Internet," *Mendiola* v. *CPS Sec. Solutions, Inc.*, 340 P.3d 355, 361 (Cal. 2015).

To adopt the different wage-and-hour rules prescribed by California "would effectively rewrite" the "carefully considered" standards in the FLSA, *Lewis*, 523 U.S. at 164, thereby "modifying or repealing" the minimum-wage and maximum-hours requirements selected by Congress, *Williams*, 327 U.S. at 718. That is precisely the kind of inconsistency this Court has determined precludes adopting state law under the Assimilative Crimes Act. See *Lewis*, 523 U.S. at 169 (refusing to assimilate state law given "the detailed manner in which the federal" statute "is drafted"); *Williams*, 327 U.S. at 717 (refusing to assimilate state law where Congress has defined "precise acts" constituting a crime).

To be sure, complying with both the FLSA and state law would not be impossible. An employer could do so by following the more demanding requirements. And this Court has held that the FLSA does not bar adherence to a more demanding standard imposed by a different federal statute. See *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, 518-519 (1950) (concluding that the FLSA could be enforced in tandem with the Walsh-Healey Act, 41 U.S.C. 6501 *et seq.*). But the "impossibility" standard this Court applied in reconciling two federal laws enacted by Congress, *ibid.*, is not the standard that governs here, because California law *does not*

become federal law unless a court *first determines* that it is "not inconsistent with" the FLSA. 43 U.S.C. 1333(a)(2)(A).

The appropriate analogy is thus not to this Court's cases attempting to harmonize multiple laws enacted by Congress, but to its cases determining whether to adopt state law as federal law. See *Lewis*, 523 U.S. at 164-165. Closely related are cases in which this Court has determined whether federal statutory law displaces *federal common law* (of which assimilated state law could be considered a variety). See, *e.g.*, *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 423-424 (2011). In those cases, the Court has refused to apply federal common law if a federal statute "speaks directly to the question at issue." *Id.* at 424 (brackets, citation, and internal quotation marks omitted). Here, the FLSA speaks directly to the question at issue by prescribing particular minimum-wage, overtime, and maximum-hours requirements. No basis exists to nullify those carefully specified requirements by elevating different requirements to the status of federal law and then displacing the choices made by Congress with choices made by California.

3. The court of appeals' holding that California law is "not inconsistent with" the FLSA is mistaken

In determining that California wage-and-hour law is "not inconsistent with" the FLSA, the Ninth Circuit relied heavily on the FLSA's savings clause, which "expressly provides that states are free to adopt more protective standards for minimum wages or maximum hours in a work week." Pet. App. 36. That reasoning is flawed. The FLSA savings clause provides only that *the FLSA itself* does not bar enforcement of more protective wage-and-hour standards. See 29 U.S.C. 218(a)

("No provision of *this chapter* * * * shall excuse noncompliance" with "higher" minimum-wage or "lower" maximum-hours laws.) (emphasis added). The FLSA does not, however, assimilate state law prescribing more protective wage-and-hour standards than federal law or provide for enforcement of such standards by the Department of Labor or private plaintiffs. See, *e.g.*, *Ervin* v. *OS Rest. Servs., Inc.*, 632 F.3d 971, 977 (7th Cir. 2011). The presence of the FLSA savings clause thus does not affect the conclusion that California wage-and-hour law is inconsistent with the substantive wage-and-hour provisions of the FLSA. Indeed, the savings clause is, by definition, implicated only when there is some measure of inconsistency between the FLSA and another law. See 29 U.S.C. 218(a) (referring to a "higher" minimum wage or a "lower" maximum workweek).

The Ninth Circuit's contrary position would effectively adopt principles from one species of conflict preemption—*i.e.*, that state law is "impliedly preempted where it is 'impossible for a private party to comply with both state and federal requirements'"—as the governing rule on the OCS. *Mutual Pharm. Co.* v. *Bartlett*, 570 U.S. 472, 480 (2013) (citation omitted). But that is a fundamental principle that applies to all juridictions. The Ninth Circuit's position thus disregards OCSLA's extension of federal law to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State" (*i.e.*, a federal enclave). 43 U.S.C. 1333(a)(1). Indeed, the court's position would largely adopt a legal regime that Congress expressly rejected when it declined to pass "an amendment to the Act which would have made 'the laws of such State applicable to the newly acquired area'" as a general matter. *Rodrigue*, 395 U.S. at 359 (citation

omitted). That is not a permissible reading of the statute. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded.") (citation omitted).

More fundamentally, the Ninth Circuit's position would extend impossibility-preemption principles "derived" from the Supremacy Clause, *Bartlett*, 570 U.S. at 480 (citation omitted), to a setting in which the Supremacy Clause has no role to play. Because OCSLA incorporates state law only as "the law of the United States," 43 U.S.C. 1333(a)(2)(A), there is no possible conflict between state law as such and federal law, and therefore no basis for the Supremacy Clause to supply the rule of decision.

C. The Decision Below Would Disrupt Settled Expectations And Orderly Administration On The OCS

The decision below would disrupt long-settled expectations on the OCS. As the Ninth Circuit recognized, its reading of OCSLA departs from the Fifth Circuit's in *Continental Oil*, which provided the governing standard in OCS cases for a half-century. Pet. App. 20 n.13. Affirming the Ninth Circuit's novel construction would dramatically alter business arrangements on the OCS. California's rule that employers must pay employees for all hours spent on the drilling platform would appear to require employers to more than double their labor costs, cut their workers' wages, or adjust their employment structures, for example by requiring employees to return to the mainland every night. Additional applications of California wage-and-hour law could have other unpredictable effects. And the Ninth Circuit left open the possibility of retroactive liability as well. See *id.* at 43.

Adopting state wage-and-hour law as federal law on the OCS would also create new administrative burdens.

Because all OCS law must be "administered and enforced by the appropriate officers and courts of the United States," 43 U.S.C. 1333(a)(2)(A), federal officials, presumably in the Department of Labor, would have to learn and apply a multiplicity of unfamiliar state requirements over and above the provisions of the FLSA that those officials have long enforced. Many of those additional state requirements are complex and depend on judicial or administrative constructions of state law. See *Mendiola*, 340 P.3d at 361. Imposing such responsibilities on federal officials would be especially anomalous given OCSLA's overriding focus on the exclusivity of federal "jurisdiction, control, and power of disposition." 43 U.S.C. 1332(1).

The Ninth Circuit's decision could have implications well beyond the wage-and-hour laws at issue here. Numerous federal statutes, administered by various federal agencies, specify regulatory standards affecting the OCS. The Department of Labor, for example, administers multiple statutes that apply on the OCS, including the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*; the Service Contract Act of 1965, 41 U.S.C. 6701 *et seq.*; and the Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701 *et seq.* The Coast Guard administers comprehensive safety regulations for the OCS. See 43 U.S.C. 1347; 33 C.F.R. Ch. I, Subch. N. The Environmental Protection Agency administers the Clean Air Act, 42 U.S.C. 7401 *et seq.*, the Clean Water Act, 33 U.S.C. 1251 *et seq.*, and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901 *et seq.*, for portions of the OCS. And the Department of the Interior administers numerous

statutes and programs related to energy and mineral exploration, development, and production on the OCS. See 30 C.F.R. Chs. II and V.[6]

Many of those statutes expressly provide that they apply to, or limit state jurisdiction on, the OCS, which makes especially clear that Congress intended those federal regulatory regimes and not state law to govern. But some of those statutes also have general provisions that resemble the FLSA's savings clause. See, *e.g.*, 42 U.S.C. 7416. If this Court were to affirm the Ninth Circuit's decision, courts could be urged to conclude (erroneously, in the government's view) that such general savings clauses likewise require adoption of state regulatory law as federal law on the OCS. That would result in more chaotic regulatory regimes, heavier federal administrative burdens, and more significant interference with statutorily mandated policy objectives. More fundamentally, the widespread adoption of state law on the OCS would undermine the textually demonstrated and long-understood principle that OCSLA "emphatically" asserts the federal government's "paramount" sovereignty over the OCS. *Maine*, 420 U.S. at 526. Confining state law to its important but secondary role to "supplement[] gaps in the federal law" on the OCS, by contrast, is consistent with the text, history, and purpose of OCSLA, as well as this Court's longstanding precedent interpreting it. *Rodrigue*, 395 U.S. at 357.

---

[6] The Department of the Interior, rather than EPA, regulates air pollutant emissions for portions of the OCS in the Gulf of Mexico and the Arctic Ocean. 42 U.S.C. 7627(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CHRISTOPHER G. MICHEL
Assistant to the Solicitor General
MARK B. STERN
JENNIFER L. UTRECHT
Attorneys

FEBRUARY 2019

APPENDIX

1. 43 U.S.C. 1332 provides:

Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and noncoastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from

any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the outer Continental Shelf adjacent to State lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.[1]

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and tech-

---

[1] So in original. The period probably should be a semicolon.

niques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

2. 43 U.S.C. 1333 provides:

Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other

Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting[1] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

---

[1] So in original. Probably should be "settling".

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon

any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

3. 18 U.S.C. 13(a) provides:

Laws of States adopted for areas within Federal jurisdiction

(a) Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situ-

ated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

4. 29 U.S.C. 206(a)(1) provides:

Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

5. 29 U.S.C. 207(a)(1)

Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

6. 29 U.S.C. 218(a) provides:

Relation to other laws

(a) No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter. No provision of this chapter shall justify any employer in reducing a wage

paid by him which is in excess of the applicable minimum wage under this chapter, or justify any employer in increasing hours of employment maintained by him which are shorter than the maximum hours applicable under this chapter.

7. 29 C.F.R. 785.23 provides:

Employees residing on employer's premises or working at home.

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home.

No. 18-389

In the
Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION ("CAAA") AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

WILLIAM A. HERRERAS
ATTORNEY AT LAW
709 E. Grand Ave.
Arroyo Grande, CA 93421
(805) 473-8550
wahatty@williamaherras.com

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

MARCH 2019 *Counsel for Amicus Curiae*

GibsonMoore Appellate Services, LLC
206 East Cary Street • Richmond, VA 23219
804-249-7770 • www.gibsonmoore.net

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE COURT BELOW'S DECISION IS CONSISTENT WITH INTERPRETATIONS OF OTHER FEDERAL ACTS USING THE SAME OPERATIVE PHRASE 3

II. THE COURT BELOW'S DECISION IS CONSISTENT WITH STATE INTERESTS 6

A. The States Have A Strong Interest In What Occurs On OCS Oil Platforms 6

B. State Law Applies On OCS Oil Platforms In Many Ways 9

III. AFFIRMING THE JUDGMENT BELOW WOULD PROTECT WORKERS ON OIL PLATFORMS 10

A. Life On OCS Oil Platforms Is Difficult And Dangerous 10

B. Petitioner's Argument Could Limit Workers Compensation Benefits 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Adkins v. Arnold,
235 U.S. 417 (1914) 5

Bobbitt v. Workers' Comp. Appeals Bd.,
192 Cal. Rptr. 267 (Cal. Ct. App. 1983) 12, 13

Butte City Water Co. v. Baker,
196 U.S. 119 (1905) 4

Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 9

Clinton v. Englebrecht,
80 U.S. 434 (1871) 5

LeSassier v. Chevron USA, Inc.,
776 F.2d 506 (5th Cir. 1985) 14

Maynard v. Hill,
125 U.S. 190 (1888) 5

Nations v. Morris,
483 F.2d 577 (5th Cir. 1973) 13, 14

Pac. Operators Offshore, LLP v. Valladolid,
565 U.S. 207 (2012) 13, 14

People v. Rinehart,
377 P.3d 818 (Cal. 2016) 4

Riley v. Southwest Marine, Inc.,
250 Cal. Rptr. 718 (Cal. Ct. App. 1988) 14

Rodrigue v. Aetna Casualty & Surety Co.,
395 U.S. 352 (1969) 9

Sullivan v. Oracle Corp.,
254 P.3d 237 (Cal. 2011) 7

Sun Ship v. Pennsylvania,
447 U.S. 715 (1980) 13, 14

Tidewater Marine Western, Inc. v. Bradshaw,
927 P.2d 296 (Cal. 1996) 6

Statutes

30 U.S.C. § 22 4

33 U.S.C. 901 *et seq.* ("LHWCA") 12, 13, 14

43 U.S.C. § 1332(5) 8

43 U.S.C. § 1333(a)(1) ("OCSLA") 3, 4, 7, 13

43 U.S.C. § 1337(g)(5)(a)(i) 8

Cal. Gov. Code § 110 7

Cal. Gov. Code §§ 170-171 7

Cal. Lab. Code § 1171.5(a) 7

Cal. Lab. Code § 3602(a) 14

Other Authorities

Act of Aug. 14, 1848, ch. 177, § 6, 9 Stat. 323 5

Act of Feb. 19, 1903, ch. 707, 32 Stat. L. 841 5

Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*,
11 Ecology L. Q. 401 (1984) 7

General Mining Law of 1872,
Sess. 2, ch. 152, 17 Stat. 91–96;
H. R. No. 1016 by Aaron A. Sargent (R-CA)
January 15, 1872 ..... 1, 3, 4

Jie Jenny Zou, *8 Years After Deepwater Horizon Explosion, Is Another Disaster Waiting to Happen?*, NPR (Apr. 20, 2018), https://www.npr.org/2018/04/20/603669896..... 12

Organic act, BALLENTINE'S LAW DICTIONARY (3d. ed. 1969)..... 2, 4

Ron Bousso, *BP Deepwater Horizon costs balloon to $65 billion*, REUTERS (Jan. 16, 2018), https://www.reuters.com/article/us-bp-deep waterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL..... 8

The Dangers of Offshore Oil Rigs, MARITIME INJURY GUIDE (July 30, 2014), https://www.maritimein juryguide.org/blog/dangers-offshore-oil-rigs/ 12

Thomas Curwen, *A historic oil platform off Santa Barbara turns into a rusty ghost ship*, Los Angeles Times (March 14, 2019), https://www.latimes.com/projects/la-me-platform-holly/..... 8

U.S. Dep't of the Interior, *Social and Economic Impacts of Outer Continental Shelf Activities on Individuals and Families* (2002) 11

INTEREST OF AMICUS CURIAE[1]

Formed in 1966, the California Applicants' Attorneys Association ("CAAA") is an association and organization of California State Bar members who represent men and women who sustained injuries arising out of, and occurring in the course of, their employment. As a regular part of its activities, CAAA files Amicus Curiae briefs in cases of far reaching significance and/or first impression before the California Workers Compensation Appeals Board, Courts of Appeal, and Supreme Court. Because its members represent people who were injured while working on oil platforms, CAAA has a strong interest in this case. As representatives of workers injured in and around the State of California, including on Outer Continental Shelf oil platforms, CAAA has the knowledge and expertise to address important aspects of state law and of life on oil platforms.

SUMMARY OF ARGUMENT

Other federal acts using the phrase "applicable and not inconsistent" when establishing governing law support the court below's conclusion that no "gap" in federal law is required before state legal standards become "applicable." The Mining Act of 1872 used the same phrase in authorizing the exploration and purchase of mineral deposits, and this Court interpreted the language to allow the

---

[1] This brief was prepared by counsel for amicus curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

states to enact laws more protective than existing federal law. The "organic acts" that established the Indian Territories and the Oregon Territory are other federal acts that used the language at issue here and that have been interpreted to allow states to enact more protective law.

Unlike Petitioner and its amici, the court below recognizes the important interests states have regarding Outer Continental Shelf ("OCS") oil platforms. States are legitimately concerned with working conditions on the platforms, possible catastrophic effects on the states' coastal environments, and financial impact to the states' economies. Here, California's concerns regarding working conditions include health, safety, and the prevention of overwork. As to the environment, such catastrophes as the 1969 Santa Barbara oil spill and the 2010 Deepwater Horizon explosion illustrate how what happens on OCS oil platforms does not necessarily stay on OCS oil platforms. The states have a financial interest in OCS oil platforms, too, sharing significantly in the government revenue they generate and benefitting economically from the gainful employment of their citizens there. In addition, state labor laws already apply on the OCS oil platforms in numerous ways.

Finally, the court below protects the interests of oil platform workers. Despite the portrayal, by Petitioner's amici, of life on the platforms as cushy, workers there endure difficult and dangerous conditions. Petitioner's argument threatens the ability of injured workers to obtain concurrent federal and state workers compensation benefits, an ability that California courts have long recognized

and this Court has approved. If accepted, Petitioner's "no gap to fill" theory could be used to argue that federal workers compensation benefits are exclusive, undoing decades of protection for workers injured on the platforms.

ARGUMENT

CAAA fully agrees with all of Respondent's contentions regarding the proper interpretation of the phrase "applicable and not inconsistent" in the Outer Continental Shelf Lands Act ("OCSLA"). Indeed, CAAA submits that Respondent's Summary of Argument (at 16-21) provides a clear, persuasive, and thorough analysis for the eventual opinion in this case. Rather than repeat Respondent's contentions, CAAA writes separately to address other aspects of federal and state law that support Respondent.

I. THE COURT BELOW'S DECISION IS CONSISTENT WITH INTERPRETATIONS OF OTHER FEDERAL ACTS USING THE SAME OPERATIVE PHRASE

Some historic federal acts applying "applicable and not inconsistent" state law to federal territory support the judgment below, because in those acts Congress and this Court have not required any "gap" in federal law before state law applies.

For example, The Mining Act of 1872 authorizes the exploration and purchase of mineral deposits within the United States and uses language similar to that at issue in this case, providing that mineral deposits are open to exploration and purchase "under regulations prescribed by law, and according to the local customs or rules of miners in the several

mining districts, so far as the same are *applicable and not inconsistent with* the laws of the United States." 30 U.S.C. § 22 (2012) (emphasis added).

Interpreting that Act, this Court held that states have authority to enact laws more protective than existing federal law. *Butte City Water Co. v. Baker*, 196 U.S. 119, 124 (1905). Rejecting the argument that Montana state regulations were impermissibly more stringent than Congressional intent, this Court reasoned that Congress had clearly recognized the existence of state law in its statutory language, including those that were "applicable and not inconsistent" with federal law. *Id.* at 125-26. The Court noted the state might reasonably want to guard against the risk of false land claims and to create a record of mining claims for future reference. *Id.* at 128; *see also People v. Rinehart*, 377 P.3d 818, 824-25 (Cal. 2016) (noting that the Mining Act "endorses in the first instance local, rather than federal, control over the mining fields" and suggests "an apparent willingness on the part of Congress to let federal and state regulation broadly coexist").

In addition to The Mining Act of 1872, Congress similarly adopted state law to function as federal law in "organic acts" that established new territories within the United States. An organic act is "an act providing and establishing a government." *Organic act*, BALLENTINE'S LAW DICTIONARY (3d. ed. 1969). In some organic acts, Congress adapted existing state laws as federal law for the territories using the same "applicable and not inconsistent" phrase found in OCSLA.

For instance, Congress extended the laws of Arkansas into newly created Indian Territories

using the same "applicable and not inconsistent" phrase. Act of Feb. 19, 1903, ch. 707, 32 Stat. L. 841 (extending Arkansas state law into the territory "so far as the same may be *applicable and not inconsistent* with any law of Congress"). In determining that Arkansas state laws applied in the territory, this Court held that the language of the statute showed that "Congress intended they should have the same force and meaning there they had in Arkansas." *Adkins v. Arnold*, 235 U.S. 417, 421 (1914).

The organic act establishing the Oregon Territory also used language similar to OCSLA by giving the new government legislative power that should "extend to all rightful subjects of legislation *not inconsistent* with the Constitution and laws of the United States." Act of Aug. 14, 1848, ch. 177, § 6, 9 Stat. 323 (emphasis added). This Court interpreted the language to empower the Oregon legislature to pass a legislative divorce because that action was not deemed to violate any federal law or constitutional protection. *Maynard v. Hill*, 125 U.S. 190, 210 (1888). The Court was not concerned with any gap between state and federal law, but assumed the power of the state to legislate, as long as the legislation was not inconsistent with federal protections. *Id.*; *see also Clinton v. Englebrecht*, 80 U.S. 434, 445 (1871) (holding that the Utah territory could prescribe methods of jury selection as long as they did not violate federal law).

In short, as recognized by this Court's precedent, Congress has long used the phrase "applicable and not inconsistent" to allow application of state law on

federal property without regard to the existence of any "gap" in federal law.

II. THE COURT BELOW'S DECISION IS CONSISTENT WITH STATE INTERESTS

Petitioner and its amici wrongly argue that the states have nefarious intent vis-à-vis OCS oil platforms and that state law has no application on the platforms.[2] Neither argument has merit. The truth is, the states rightly care about employment and other conditions on OCS platforms near their shores, and state law applies on the platforms in many ways regardless of whether there is a "gap" in federal law.

A. The States Have A Strong Interest In What Occurs On OCS Oil Platforms

California and other coastal states have numerous legitimate concerns related to OCS oil platforms, including employment conditions for their workers, possible environmental harm to their coasts, and financial impact on their economies.

First, California has an interest in regulating employment conditions in the Santa Barbara Channel, where Respondent worked. *See Tidewater Marine Western, Inc. v. Bradshaw*, 927 P.2d 296, 301 (Cal. 1996) ("California employment laws implicitly extend to employment occurring within California's state law boundaries, including all of the Santa

---

[2] *See, e.g.*, Br. of Chamber of Commerce at 21 (fearing states will "second guess or supplant otherwise comprehensive federal schemes" and create "turmoil" on the OCS); Br. of Freeport-McMoran Oil & Gas LLC et al. at 22 (fearing states will engage in the "strategic behavior" of enacting facially neutral statutes that "increase the difficulty and cost of OCS operations").

Barbara Channel."); Cal. Gov. Code § 110 (West) ("The sovereignty and jurisdiction of this State extends to all places within its boundaries as established by the constitution."); Gov. §§ 170-171 (defining the state law boundaries, as defined by the state Constitution, to include the area between the coastal islands and the mainland). The state has "unambiguously asserted a strong interest in applying its overtime law to all nonexempt workers, and all work performed, within its borders." *Sullivan v. Oracle Corp.*, 254 P.3d 237, 245 (Cal. 2011) (citing Cal. Lab. Code § 1171.5(a) ("All protections, rights, and remedies available under state law . . . are available to all individuals . . . employed, in this state."). The state's interests as to its employees include "protecting health and safety . . . and preventing the evils associated with overwork." *Sullivan*, 254 P.3d at 245.

Second, all of our coastal states have a vital interest in protecting the environment from the ecological disasters that OCS oil platforms can cause. Fifty years ago, the Santa Barbara oil spill revealed that OCSLA, at least before it was amended in 1978, "failed to protect the public interest in wise management of offshore resources. The Santa Barbara spill probably would not have occurred had California's drilling regulations, rather than the Interior Department's, been in force." Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil and Gas Development*, 11 Ecology L. Q. 401, 434 (1984).

As amended in 1978, OSCLA now contains a declaration of Congressional policy to consider and recognize the rights of states "to preserve and

protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity." 43 U.S.C. § 1332(5) (2012).

The states' interest in protecting their coastal environment is made evident by the devastating impact of the Deepwater Horizon spill. That disaster in the coastal areas adjacent to Louisiana caused damage with costs exceeding $65 *billion*. Ron Bousso, *BP Deepwater Horizon costs balloon to $65 billion*, REUTERS (Jan. 16, 2018), https://www.reuters.com/article/us-bp-deepwaterhorizon/bp-deepwater-horizon-costs-balloon-to-65-billion-idUSKBN1F50NL. More than 400,000 damages claims were filed and millions of people were affected. *Id.*

Third, the states also have a financial interest in OCS oil platforms. For instance, twenty-seven percent of the revenue from federal leases in the first three miles of the OCS beyond the seaward boundary goes to the adjacent state. 43 U.S.C. § 1337(g)(5)(a)(i). Employees pay state income tax and contribute to the economy. Offshore oil platform operators both can be a county's leading taxpayer and can leave behind platforms that cost taxpayers many millions of dollars to decommission. *See* Thomas Curwen, *A historic oil platform off Santa Barbara turns into a rusty ghost ship*, Los Angeles Times (March 14, 2019), https://www.latimes.com/projects/la-me-platform-holly/.

B. State Law Applies On OCS Oil Platforms In Many Ways

Referring to OSC oil platforms, this Court has observed that Congress "recognized that the 'special relationship between the men working on these artificial islands and the adjacent shore to which they commute' favored application of state law with which these men and their attorneys would be familiar." *Chevron Oil Co. v. Huson*, 404 U.S. 97, 103 (1971) (quoting *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 365 (1969)). This observation is borne out on OSC platforms to this day, because state law applies on the platforms in many ways.

For example, labor law posters mandated by California law are posted on the OCS oil platforms. They are posted somewhere that is accessible to the employees, and among other aspects of labor law they set out California wage-and-hour protections. They list many relevant state and federal employment law policies, regardless of whether the state laws fill any sort of "gap" in the federal law.

Brochures regarding state law—including domestic violence, sexual harassment, disability insurance, and workers compensation laws—are also prominently placed in areas on the platforms visited by employees.

In almost all situations of which CAAA members are aware, OCS platform employers are paying daily overtime after 8 hours of work and double time after 12 hours of which, which are both California Labor Code concepts not found in federal law. Many employment agreements between OCS platform operators and their employees provide that the

California Labor Code applies and incorporate it by reference. They do not refer to any federal employment law and certainly not to any "gap" in federal labor law requirements.

Moreover, employees on the OCS oil platforms adjacent to California pay California state taxes and have those taxes withheld from their paychecks. They also have state disability insurance contributions withheld.

In short, state law already applies on the OCS oil platforms regardless of whether there is any "gap" in federal law.

III. AFFIRMING THE JUDGMENT BELOW WOULD PROTECT WORKERS ON OIL PLATFORMS

Finally, CAAA urges the Court to affirm the judgment below because that would protect OCS oil platform workers. Their working conditions are challenging, and Petitioner's argument could jeopardize their eligibility for concurrent federal and state workers compensation benefits.

A. Life On OCS Oil Platforms Is Difficult And Dangerous

The petroleum industry's amicus brief wrongly represents working conditions on the platforms, in two major ways. *See* Br. of Freeport-McMoran Oil & Gas LLC et al. at 24-26. First, the brief implies that employees freely choose to live for 14 days in a row on oil platforms at sea. *See id.* at 24. Employees agree to do so, the brief states, to avoid an

undesirable commute. *Id.*[3] In truth, employees are not free to leave the platforms or to come and go as they please. They can be disciplined and even suspended for doing so.

Second, the industry brief portrays a cushy lifestyle on the platforms akin to a resort, with "abundant time off" and various free "amenities" such as cable TV, "allowing employees to engage cost-free in many of the same personal and leisure activities they enjoy on land." *Id.* at 25-26. The reality is quite different.

Living offshore for 14 straight days strains family relationships and limits one's social life. *See* U.S. Dep't of the Interior, *Social and Economic Impacts of Outer Continental Shelf Activities on Individuals and Families* 28 (2002) (noting that the length and variance in work schedules create severe hardships on family life with a wife reporting "struggle and conflict every time her husband returned because of the length of his absence"). Unlike guests at a resort, employees on the platforms live four to a room, with no real privacy. They are subject to random drug testing 24/7. Their lockers are also subject to random searches. No alcohol is allowed. No visitors are allowed. No pets are allowed. Internet use is restricted. During their 12 hours off, employees are still subject to being called back to work at any time.

---

[3] The commute might be difficult, the industry brief posits, because employees need to live far inland in order to find affordable housing. *Id.* In fact, the cost of living that the industry alludes to instead highlights one reason that the state has a strong interest in having its wage and overtime pay requirements apply.

And then there is the danger. Oil workers are "seven times more likely than the average U.S. worker to die on the job." Jie Jenny Zou, *8 Years After Deepwater Horizon Explosion, Is Another Disaster Waiting to Happen?*, NPR (Apr. 20, 2018), https://www.npr.org/2018/04/20/603669896. Deaths on the platforms, or serious injuries, have many causes. The causes of deaths and serious injuries include:

- fires and explosions,
- fall-related accidents,
- falling objects, and
- fatigue from long, hard hours.

The Dangers of Offshore Oil Rigs, MARITIME INJURY GUIDE (July 30, 2014), https://www.maritimeinjuryguide.org/blog/dangers-offshore-oil-rigs/. In 2010, the Deepwater Horizon explosion killed 11 oil platform workers and injured 17 more, and there have been other deaths at offshore platforms since then. Zou, *supra*.

The difficult and dangerous conditions that oil platform workers endure underscore the need for robust labor law protection, including state wage-and-hour laws.

B. Petitioner's Argument Could Limit Workers Compensation Benefits

California law has long provided that employees injured while working on OCS oil platforms are not limited to benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) and may claim state workers compensation benefits. *Bobbitt v. Workers' Comp. Appeals Bd.*, 192 Cal. Rptr. 267, 269 (Cal. Ct. App. 1983). Benefits in one

proceeding are credited against the other, to prevent double recoveries. *Id.* In that way, injured employees may recover whichever benefits are more generous. *Id.* The California Court of Appeals in *Bobbitt* applied this Court's reasoning in *Sun Ship v. Pennsylvania*, 447 U.S. 715 (1980).

In *Sun Ship*, this Court stated that "[c]oncurrent jurisdiction for state and federal compensation laws is in no way inconsistent with [the LHWCA] policy of raising awards to a federal minimum." *Id.* at 723. The Court noted that "if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system." *Id.* at 724. The Court concluded that "we find no evidence that Congress was concerned about a disparity between adequate federal benefits and *superior* state benefits." *Id.*

More recently, this Court rejected a platform operator's argument "that the OCSLA excludes OCS workers from LHWCA coverage when they are also eligible for state benefits." *Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 218 (2012). Amicus CAAA is concerned, however, that Petitioner's "no gap to fill" argument could be logically extended to prevent injured workers from seeking concurrent benefits under state and federal workers compensation laws, on the ground that the LHWCA is a comprehensive federal statute with "no gaps to fill." Indeed, the Fifth Circuit came to that very conclusion, in *Nations v. Morris*, 483 F.2d 577 (5th Cir. 1973). The *Nations* court held that, under OCSLA, a state injury law could not supplement the LHWCA because the federal statute was

"comprehensive," "complete and self-sufficient," and did not have any gaps ("not even a tiny one") that the state injury law could fill. *Id.* at 588-89; *see also LeSassier v. Chevron USA, Inc.*, 776 F.2d 506 (5th Cir. 1985) (holding that *Sun Ship* did not control in an OCS-based claim and that a state injury law was not applicable when an OCS worker was covered by the LHWCA).

Accepting Petitioner's argument could therefore undercut both *Valladolid* and California workers compensation law, jeopardizing the rights of injured workers.

It is worth remembering that workers compensation laws were passed as a "trade-off" in which employees gave up the right to sue for tort damages in exchange for fixed, limited benefits and the end of harsh (and by now abolished) common law defenses such as contributory negligence. *See, e.g., Riley v. Southwest Marine, Inc.*, 250 Cal. Rptr. 718, 727 (Cal. Ct. App. 1988); Cal. Labor Code § 3602(a) (West) (providing that an employee's exclusive remedy against his employer for a work injury is workers' compensation, with very limited exceptions). Thus, with workers compensation already a limitation on possible remedies and forums, the Court should avoid creating any doubt in this case about the availability of concurrent state and federal workers compensation benefits.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

JOHN J. KORZEN
Counsel of Record
WAKE FOREST UNIVERSITY
SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
Post Office Box 7206
Winston-Salem, NC 27109
(336) 758-5832
korzenjj@wfu.edu

WILLIAM A. HERRERAS
ATTORNEY AT LAW
709 E. Grand Ave.
Arroyo Grande, CA 93421
(805) 473-8550
wahatty@williamaherras.com

Counsel for Amicus Curiae

MARCH 2019

No. 18-389

In The Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act, state law is borrowed as the applicable federal law only when there is a gap in the coverage of federal law, as the Fifth Circuit has held, or whenever state law pertains to the subject matter of a lawsuit and is not preempted by inconsistent federal law, as the Ninth Circuit has held.

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. Preemption Analysis Has No Role To Play In Choosing Whether To Apply Enacted Federal Law Or Borrowed State Law In An Area Of Exclusive Federal Jurisdiction. 4

II. Applying State Law On The Outer Continental Shelf Because It Is Not Preempted Within State Territory Leads To Perverse Results And Disrupts Settled Expectations. 14

A. Importing California's Outlier Wage and Hour Law Would Require Major Restructuring of Employment Relationships. 15

B. The Potential Disruptive Consequences of the Ninth Circuit's Upside-Down Preemption Analysis Extend Far Beyond Wage and Hour Law 20

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Arizona v. United States,
567 U.S. 387 (2012) 7

Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) 14

Dynamex Operations W., Inc. v. Superior Court,
416 P.3d 1 (Cal. 2018) 18

Encino Motorcars, LLC v. Navarro,
138 S. Ct. 1134 (2018) 18

Goodyear Atomic Corp. v. Miller,
486 U.S. 174 (1988) 9

Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 5, 6

INS v. Cardoza-Fonseca,
480 U.S. 421 (1987) 12

Mendiola v. CPS Sec. Sols., Inc.,
340 P.3d 355 (Cal. 2015) 16, 18

New York v. United States,
505 U.S. 144 (1992) 7

Pac. Operators Offshore, LLP v. Valladolid,
565 U.S. 207 (2012) 12

Rodrigue v. Aetna Cas. & Sur. Co.,
395 U.S. 352 (1969) 3, 4, 5, 8, 13

Rush Prudential HMO, Inc. v. Moran,
536 U.S. 355 (2002) 8

Schultz v. Capital Int'l Sec., Inc.,
466 F.3d 298 (4th Cir. 2006) 18

United States v. California,
332 U.S. 19 (1947) 8

United States v. Darby,
312 U.S. 100 (1941) 2

United States v. Locke,
529 U.S. 89 (2000) 8

United States v. Reed,
734 F.3d 881 (9th Cir. 2013) 15

Yates v. United States,
135 S. Ct. 1074 (2015) 6

STATUTES

29 U.S.C.

§ 206(a)(1)(C) 16

§ 207(a)(1) 16

§ 218(a) 7, 8, 9

42 U.S.C. § 18012 13

43 U.S.C.

§ 1333(a)(1) 2, 5, 8, 11

§ 1333(a)(2)(A) 3, 5, 11, 13

§ 1333(a)(3) 13

49 U.S.C. § 31151(e)(2)(A) 13

Alaska Stat. § 23.10.060(a) 17

Cal. Lab. Code

§ 510(a) 16

§ 510(a)(2) 16

§ 514 16

§ 515(e) 17

§ 1182.12(b)(1)(C) 16

REGULATIONS

29 C.F.R.

§ 541.200(a) 17

§ 785.23 15

Cal. Code Regs. tit. 8, § 11040 17

OTHER AUTHORITIES

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* (Jan. 2018) 19

U.S. Dep't of Labor, *Minimum Wage Laws in the States* 16, 17

INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents more than three million businesses and professional organizations of every size, in every sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community.

The Chamber's membership includes businesses engaged in commerce in each of the 50 States, including offshore enterprises in States adjacent to the continental shelf. The Chamber therefore has a keen interest in ensuring that those members' long-standing employment arrangements—and other practices—are not thrown into disarray. Businesses faced with unique working conditions have negotiated with employees against the backdrop of the comprehensive Fair Labor Standards Act as the sole regime governing wage and hour rules on the continental shelf. Although compliant with federal law, such arrangements will be abruptly upended by the Ninth Circuit's countertextual and ahistorical interpretation of the Outer Continental Shelf Lands

---

[1] Counsel of record for all parties consented to the filing of the brief. S. Ct. R. 37.3(a). No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission.

Act—which engrafts conflicting but non-preempted state laws, contrary to Congress's intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the usual sense of the word, the Fair Labor Standards Act ("FLSA") and California wage and hour law are "inconsistent." California's minimum wage is more than $4 higher per hour than federal law and overtime kicks in more quickly and can accrue at higher rates. And, in provisions critical to the unique working arrangements on the remote platforms of the outer continental shelf, the FLSA does not require employers to compensate employees for all hours spent on an employer's premises, including hours spent sleeping, watching television, or engaged in other personal activities. After a 2015 California Supreme Court decision, however, California law requires an employee to be paid for all on-premises time—24 hours a day—if the employee is on "call" in any sense.

These are just a few examples; the FLSA is a "comprehensive legislative scheme," *United States v. Darby*, 312 U.S. 100, 109 (1941), that radically differs from California wage and hour law. And it should be the sole regime on the outer continental shelf. Why? Because Congress, in the Outer Continental Shelf Lands Act ("OCSLA") confirmed that the outer continental shelf is an area of "exclusive Federal jurisdiction." 43 U.S.C. § 1333(a)(1). OCSLA's choice of law provision thus "supplement[s] gaps in the federal law with state law[s] . . . but only to 'the extent that they are applicable and not inconsistent with . . .

other Federal laws.'" *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 357 (1969) (quoting 43 U.S.C. § 1333(a)(2)(A)). Here, there is no gap to fill given the FLSA's comprehensive coverage; and the inconsistency between federal and state laws could not be more glaring. Yet the Ninth Circuit displaced the well-settled FLSA regime with California wage and hour law anyway.

The Ninth Circuit's rationale for its approach was that the FLSA—like many federal laws—has a savings clause permitting States to layer additional requirements on top of federal law within state jurisdiction. But in an area of exclusive federal jurisdiction, there is no state law to "save." So the Ninth Circuit's unmoored reading of "inconsistent" relied on a specialized meaning drawn from federal preemption doctrine that makes no sense for the outer continental shelf. The solicitude for state sovereignty that informs the preemption inquiry—and motivates legislative adoption of a savings clause—has no role to play in deciding which federal standard should govern on federal land: the standard Congress enacted, or a newly-minted rule borrowed from California that wreaks havoc with settled working arrangements.

The text, structure, and history of OCSLA all confirm that Congress intended for its own enactments to govern on the federal enclave of the outer continental shelf. To read OCSLA otherwise, as the Ninth Circuit did, would mean that whenever Congress expressly or implicitly preserved a State's authority to regulate within its own jurisdiction, Congress also granted the State the power to override enacted federal law in an area of exclusive federal

jurisdiction. This would transform a federal choice of law clause for the outer continental shelf into a mechanism whereby inconsistent state laws can displace already-operative federal law. Such a reading effectively undoes Congress's central decision to make the outer continental shelf into an exclusive federal enclave and places the outer continental shelf on the same jurisdictional footing as the territory of California or other state sovereigns, even though there are no state sovereign interests to protect.

The Ninth Circuit's misuse of preemption rules also creates perverse results that threaten to disrupt long-standing business arrangements, not just for employee wages and hours, but also for many other industry practices developed under other comprehensive federal regimes. If longstanding federal regimes can be so easily displaced by facially inconsistent state laws, States with interest in regulating (or discouraging) activities on the outer continental shelf will have every incentive to press the limits of state regulatory authority, even though settled practices are already compliant with operative federal regimes.

ARGUMENT

I. Preemption Analysis Has No Role To Play In Choosing Whether To Apply Enacted Federal Law Or Borrowed State Law In An Area Of Exclusive Federal Jurisdiction.

The "purpose of the [OCSLA] was to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf." *Rodrigue*, 395 U.S. at 355. Rejecting the application of

both maritime law and adjacent state law, Congress made "federal law . . . 'exclusive' in its regulation of this area." *Id.* at 357, 358–59, 361–62; 43 U.S.C. § 1333(a)(1) ("The Constitution and laws . . . of the United States are hereby extended to the [outer continental shelf] . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State[.]"). Because interstitial federal law "might be inadequate to cope with the full range of potential legal problems," however, Congress adopted a choice of law rule to "supplement[] gaps in the federal law with state law," not by applying state law directly, but by "adopt[ing] [it] only as surrogate federal law." *Rodrigue*, 395 U.S. at 357. And even then, state law may be borrowed "only when not inconsistent with applicable federal law." *Id.* at 355–56.

Under OCSLA, California wage and hour law cannot be borrowed as "surrogate federal law" because it fails to meet the criteria of being "applicable and not inconsistent with . . . Federal laws." 43 U.S.C. § 1333(a)(2)(A). The FLSA leaves no void to be filled, making borrowed state law inapplicable, and California law's divergence from the FLSA makes it inconsistent.

The Ninth Circuit made two wrong turns on the way to holding otherwise. First, it bypassed the requirement of a federal-law gap by failing to recognize the limiting function of "applicable," in context, as meaning "suitable." Only some state laws are suitable to be applied on the outer continental shelf—those that fill gaps by addressing subjects not already covered by federal law. *See Gulf Offshore Co.*

v. Mobil Oil Corp., 453 U.S. 473, 480 (1981) (under OCSLA, state law is used "to fill the substantial 'gaps' in the coverage of federal law"). In other words, where there is already-applicable federal law, then state law is not "applicable" under OCSLA. *See* Pet. Br. 33–38.

Otherwise, under the Ninth Circuit's broad reading—where "applicable" means pertinent to the matter at hand, Pet. App. 21—any and every state law used to challenge activities on the outer continental shelf would be "applicable," because, of course, the only laws that ever apply to a lawsuit are ones that pertain to the subject matter at hand. Such a wooden reading of a single word in isolation—which deprives it of any practical meaning—cannot and should not displace the statutory context and purpose of this federal choice of law provision. It "is a 'fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'" *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (quoting *Deal v. United States*, 508 U.S. 129, 132 (1993)). The purpose and structure of OCSLA, as well as its ample legislative history, all demonstrate that the Ninth Circuit's interpretation of "applicable" makes no sense. *See* Pet. Br. 19–25.

Second, the court of appeals errantly transplanted a preemption analysis meant to protect state sovereign interests into the federal terrain of submerged seabeds and offshore structures. The court interpreted OCSLA's provision borrowing "not inconsistent" state laws to mean that borrowing was allowed so long as state law would not be preempted

by federal law within state territory. This error sustained the court's holding that California wage and hour law is somehow "not inconsistent with" the FLSA simply because the FLSA's savings clause "explicitly permits more protective state wage and hour laws." Pet. App. 36; *see* 29 U.S.C. § 218(a).

The plain meaning of "inconsistent" refutes the Ninth Circuit's approach. And importing federalism concerns where they do not belong circumvents Congress's central objective of making the outer continental shelf subject exclusively to federal law. So even if "applicable" could be read as broadly as the Ninth Circuit would have it, OCSLA's inconsistency criterion would still rule out the borrowing of California wage and hour law.

Our federalist system "adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona v. United States*, 567 U.S. 387, 398 (2012). Preemption doctrine, implementing the Supremacy Clause, addresses the "possibility that laws can be in conflict or at cross-purposes" when there are two sovereigns. *Id.* at 399.

Given this backdrop of mutual respect between dual sovereigns, although Congress may expressly or implicitly preempt state laws, *id.*, Congress may also do the opposite. For example, some federal regulatory schemes are based on a "cooperative federalism" model. *See New York v. United States*, 505 U.S. 144, 167–68 (1992) (listing an array of federal statutes deploying a cooperative federalist approach).

Congress also may enact savings clauses that preserve some of a State's pre-existing regulatory authority over an area that is also subject to federal control. *See, e.g., Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 364 (2002) (describing a "saving clause [that] reclaims a substantial amount of ground" for state regulation); *United States v. Locke*, 529 U.S. 89, 105 (2000) (describing savings clause purpose "to preserve [certain] state laws").

But in an area of exclusive federal jurisdiction where only federal law applies, savings clauses meant to preserve state authority have no role to play. Such is the case under OCSLA, where there are not two sovereigns who need to be accommodated on the outer continental shelf—there is only one: the federal government. 43 U.S.C. § 1333(a)(1); *Rodrigue*, 395 U.S. at 357. Even before the passage of OCSLA, this Court recognized that the protection and control of the outer continental shelf was solely a function of federal sovereignty, where the "national interest is unencumbered." *United States v. California*, 332 U.S. 19, 34–35 (1947).

In short, because States have no sovereign control over the outer continental shelf, and have never had any, there is no residual state authority for Congress to preserve via a savings clause. In transposing Congress's decision under the FLSA to preserve state authority regarding wage standards within state jurisdiction, 29 U.S.C. § 218(a), into an area of exclusive federal jurisdiction, the Ninth Circuit injected federalism considerations into a context where they are fundamentally misplaced.

OCSLA's choice of law rule—meant to provide parameters for when state law can be borrowed for use as federal law—is far from the clear statement that would be necessary to allow inconsistent state law to supplant long-established federal law in an area of exclusive federal jurisdiction. Jurisprudence governing the applicability of state law in federal enclaves is instructive. Far from favoring the displacement of established federal law by state law of more recent vintage, the presumption runs the other way. *See* Pet. Br. 20–21. Courts presume that ordinary congressional authorization of state regulation does *not* authorize regulation of a federal enclave unless Congress's purpose to do so is manifest. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("[T]he activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation.").

There is no such manifest intent in the FLSA's savings clause or anywhere else in the FLSA. The savings clause provides that "No provision of this Act . . . shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a [higher] minimum wage . . . or a [lower] maximum workweek . . . ." 29 U.S.C. § 218(a). As there never has been any "State law or municipal ordinance" governing the outer continental shelf, the savings clause does not indicate any congressional intent to permit States to regulate there, much less with the requisite specificity. *Compare Goodyear Atomic Corp.*, 486 U.S. at 181–82 (finding statute authorized state worker's compensation regulation in federal enclaves

where it provided that States possess authority over federal lands and facilities "to the same extent as if said premises were under the exclusive jurisdiction of the State within whose exterior boundaries such place may be").

Nor does the savings clause magically eliminate the facial inconsistency between the FLSA and California wage and hour law. Indeed, the savings clause presupposes that there is an inconsistency; it exists to tell employers how to resolve that inconsistency, by requiring them to comply with the most demanding standard. Such a requirement displaces federal law entirely where, as here, California law effectively rewrites most FLSA provisions.

Far from resolving conflicts, such misapplication of a savings clause creates them. Businesses on the outer continental shelf will be governed by (at least) two overlapping and inconsistent federal standards. And, because an employer would necessarily have to resolve the conflicts by complying with the most demanding standard, the upshot would be the displacement of a federal standard enacted by Congress with a borrowed federal standard adopted in Sacramento, and the transfer of authority from the

federal government to a State determined to impose its own standards.[2]

That was plainly not the result that Congress intended when it established federal law as exclusive on the outer continental shelf, 43 U.S.C. § 1333(a)(1), and barred the borrowing of "inconsistent" state law, *id.* § 1333(a)(2)(A). Reading "not inconsistent with" to mean "not preempted by" effectively undoes the central premise of OCSLA. The outer continental shelf ends up on precisely the same footing as Los Angeles: state law governs unless preempted by federal law—no matter how widely it diverges from enacted federal standards—except that it is deemed "federal law" and is enforced exclusively by federal regulators. *See id.* § 1333(a)(2)(A) (providing that borrowed state laws

---

[2] Under the Ninth Circuit's preemption analysis, each State adjacent to the outer continental shelf could impose its own (differing) wage and hour standards simply because, on the mainland, such standards would be protected under the FLSA's savings clause. States could thus override long-established federal law on federal land, and employers operating in compliance with established federal law would no longer be able to implement uniform procedures across all of their outer continental shelf operations.

"shall be administered and enforced by the appropriate officers and courts of the United States").[3]

That is exclusive federal jurisdiction in name only, and it is little different from the proposals to adopt state law as OCLSA's governing standard that Congress rejected, because there, too, state law would have been subject to ordinary preemption. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

Nothing in the text of OCSLA commands this topsy-turvy result. The ordinary meaning of "inconsistent" easily rules out the borrowing of California wage and hour law in lieu of the FLSA. The differences between the two laws are legion, and outcome-dispositive. *See infra* pp. 15-18. As even the Ninth Circuit acknowledged, "California's minimum wage and overtime laws . . . establish different and more generous benchmarks than the . . . FLSA's statutory and regulatory scheme." Pet. App. 36–37.

---

[3] As Petitioner argues (Br. 19), most "borrowed" state law will be interstitial common law, such as contract law governing simple contract disputes. The provision for federal administrators to apply state law comes into play primarily where Congress has made explicit that state regulations should apply in the outer continental shelf, such as for workers' compensation. *See Pac. Operators Offshore, LLP v. Valladolid*, 565 U.S. 207, 218 (2012) (holding the "workers' compensation scheme incorporated by the OCSLA explicitly anticipates that injured employees might be eligible for both state and federal benefits").

Had Congress wanted to invoke the test the Ninth Circuit applied, it could have authorized borrowing of state laws to "the extent that they are applicable and not [preempted by] this Act or . . . other Federal laws." 43 U.S.C. § 1333(a)(2)(A).[4] But Congress chose "not inconsistent with" instead. It would turn principles of federalism—and of statutory construction—upside down to give the phrase anything other than its plain meaning.

The structure of OCSLA's choice of law provisions reinforces that this choice was intentional. Congress provided that borrowed state law was to be administered by federal regulators, *id.*, an odd choice if it was contemplating the borrowing of all state law that was not preempted—i.e., the same scope of state regulatory authority that applies in Fresno. And it expressly provided that the borrowing of state law "shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the [OCS]." *Id.* § 1333(a)(3). This prohibition on a State's assertion of jurisdiction would ring hollow if the State's authority was effectively the same on the outer continental shelf as within its territory.

For those circumstances where there is no governing federal law, Congress recognized that workers' relationships with adjacent States, *Rodrigue*, 395 U.S. at 365, made it sensible to borrow interstitial standards from state law rather than have courts

---

[4] Congress knows how to express this precisely and use the phrase "not preempted" when it wants to. *E.g.*, 42 U.S.C. § 18012; 49 U.S.C. § 31151(e)(2)(A).

invent new federal common law. *See Cont'l Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). But nothing in OCSLA's text, history, or purpose indicates that Congress wanted to displace comprehensive existing, enacted federal standards with competing standards borrowed from state law.

II. Applying State Law On The Outer Continental Shelf Because It Is Not Preempted Within State Territory Leads To Perverse Results And Disrupts Settled Expectations.

The California wage and hour law that would supplant the FLSA as surrogate federal law if the Ninth Circuit's preemption test were imported into OCSLA is vastly different from the FLSA. Complying would not be a simple matter of updating a wage number or two; rather, it would require a wholesale restructuring of employment relationships on the outer continental shelf. The resulting disuniformity across different parts of the outer continental shelf would be far greater than Congress contemplated and made worse by the outlier nature of California's wage and hour law. And, under the logic of the ruling below, the potential for unintended and unwelcome state regulatory intrusion into the outer continental shelf is not readily confined to the wage and hour realm. Any non-preemptive federal law, no matter how comprehensive, would be a candidate for replacement by borrowed state laws under the Ninth Circuit's approach.

A. Importing California's Outlier Wage and Hour Law Would Require Major Restructuring of Employment Relationships.

California law is inconsistent with the FLSA (and most other States' laws) on every major topic covered by a wage and hour law: wages, hours, overtime, and employee status. Substituting California law for federal law results in the wholesale jettisoning of long-settled and uniform federal wage and hour law with a dramatically different regulatory scheme. That will not do. Even in *United States v. Reed*, 734 F.3d 881 (9th Cir. 2013), a case interpreting the Assimilative Crimes Act relied upon below, Pet. App. 29–30, the court recognized that a "state statute will not be assimilated" as a crime applicable in federal enclaves if "it would effectively rewrite an offense definition that Congress carefully considered." *Reed*, 734 F.3d at 888. But rewriting Congress's carefully considered standards is exactly what the Ninth Circuit did here.

Key to this dispute, California rules for counting hours worked are different from the FLSA. Under federal law, employers and employees can make reasonable agreements regarding what on-premises hours are considered compensable, and not all of an employee's time engaged in private pursuits on an employer's premises, like sleeping or watching television, is considered work time. 29 C.F.R. § 785.23. In California, however, as of 2015 at least, personnel residing on an employer's premises must be paid for all hours on call, including those "engaged in personal activities, including sleeping, showering, eating, reading, watching television, and browsing the

Internet." *Mendiola v. CPS Sec. Sols., Inc.*, 340 P.3d 355, 361 (Cal. 2015). And that is just the beginning of the differences.

The minimum wage itself is also different. *Compare* 29 U.S.C. § 206(a)(1)(C) ($7.25), *with* Cal. Lab. Code § 1182.12(b)(1)(C) ($12 for larger employers).[5] The way that overtime is calculated likewise differs. *Compare* 29 U.S.C. § 207(a)(1) (overtime at 40 hours per week), *with* Cal. Lab. Code § 510(a) (overtime after eight hours a day and on seventh consecutive day of work).[6] California's hours-per-day and days-per-week overtime tests are outlier provisions shared in some form by only two to three other States and Puerto Rico, *see* U.S. Dep't of Labor,

---

[5] Given the unique working conditions and related compensation structures for most workers on the outer continental shelf—now put at risk by the Ninth Circuit's decision—the majority of such workers have historically made far more than minimum wage. *See* Pet. App. 20 (noting Respondent was paid "well above the state and federal minimum wage").

[6] Certain workers covered by collective bargaining agreements are exempt from these rules. Cal. Lab. Code §§ 510(a)(2), 514.

Minimum Wage Laws in the States.[7] Only one other State with outer continental shelf operations (Alaska) shares an hours-per-day test, and even then it is not the same as California's. *See* Alaska Stat. § 23.10.060(a) (overtime based on hours per day but not consecutive days of work). Such hours-per-day tests have obvious disruptive implications for work that, per necessity, is often structured into tightly grouped days of 12-hour shifts, Pet. Br. 9–10, magnifying the upheaval created by the disuniformity between different parts of the outer continental shelf under the Ninth Circuit's approach.

Making things more complicated still, overtime exemptions are not the same between the FLSA and California wage and hour law. *E.g.*, *compare* 29 C.F.R. § 541.200(a) (2015) (exempting administrative employees whose primary duty "includes" qualifying exercise of discretion if the employee's salary exceeds $455 per week), *with* Cal. Lab. Code § 515(e), Cal. Code Regs. tit. 8, § 11040 (requiring salary of more than $880 per week and "more than one-half of the employee's worktime" to be comprised of qualifying tasks to be exempt as an administrative employee).

---

[7] *Available at* https://www.dol.gov/whd/minwage/america.htm. Alaska, Colorado, Nevada, and Puerto Rico share some variation on the hours-per-day test. *Id.* Kentucky and Connecticut have some variation on the rule requiring overtime for the seventh straight day of work, at least in certain industries. *Id.* No State other than California has both an hours-per-day and a days-per-week test, and no State requires double time for hours exceeding eight on the seventh day of work, as California does. Combined with a rule requiring 24-hour-a-day compensation, these differences have a huge potential impact for unique offshore working conditions.

And any regulatory ambiguities must be resolved according to different interpretive rules. In California, wage and hour laws must be "construed so as to promote employee protection." *Mendiola*, 340 P.3d at 359. While under the FLSA, provisions are to interpreted according to a "fair reading," without an interpretive presumption in either direction. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

Finally, California not only regulates hours, wages, and overtime differently than the FLSA—it also regulates who counts as an employee in a completely different way. Under the FLSA, employee status (versus classification as an independent contractor) depends upon the "economic reality" of whether the worker is dependent upon the hiring business or in business for himself, as determined by multiple factors. *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 304–05 (4th Cir. 2006) (citing *United States v. Silk*, 331 U.S. 704 (1947)).

Under California law, however, a newly minted test for employee status for wage and hour purposes—which starts from a mistaken presumption that all workers are employees—may sweep in many more workers who, under long-settled federal law, otherwise would qualify as independent contractors. *See Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 34–35 (Cal. 2018) (rejecting the "federal economic reality" test). Like many aspects of California wage and hour law, this approach is an outlier, and is applied in only one other State (and in no other States with outer continental shelf

operations). *Id.* at 34 n.23 (noting that California was adopting a test applied only in Massachusetts).

This divergence causes trouble for employers and employees alike. Given the major differences between the FLSA and California law, employers and employees have negotiated compensation arrangements for decades in reliance on a shared understanding that state law was "inconsistent" with the FLSA's comprehensive scheme, and therefore did not apply on the outer continental shelf. Such arrangements, often the product of collective bargaining, have typically included unique (and often highly remunerative) compensation structures well-suited to off-shore work, such as the 14-days-on, 14-days-off schedule that Respondent worked, and a shift system that provided for employees' sleeping time to be excluded from compensation. *See* Pet. Br. 9–10; U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing: Draft Proposed Program* 8-4 (Jan. 2018) (estimating that oil and gas workers earn more than 150% of the average hourly wage of other employees).[8]

Upending that settled understanding would expose employers on the outer continental shelf to the risk of substantial retroactive liability for California law violations—despite uncontested compliance with the FLSA. It would also limit the ability of employers and employees to negotiate mutually beneficial arrangements going forward, especially because

---

[8] *Available at* https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/.

company-wide arrangements would be thrown into disarray as employers were subjected to different rules for different parts of their offshore operations. If upheld, the decision below would force major changes to critical industry staffing and compensation practices, driven by a jurisdiction with no sovereign authority to impose its own rules on an area of exclusive federal jurisdiction. This is contrary to Congress's intent in OCSLA to use federal law, not state law, on the outer continental shelf.

B. The Potential Disruptive Consequences of the Ninth Circuit's Upside-Down Preemption Analysis Extend Far Beyond Wage and Hour Law.

The upheaval engendered by permitting state laws that are not preempted to displace established federal enactments on the outer continental shelf cannot necessarily be cabined to wage and hour laws, or even employer-employee relationships.

As previously noted, a host of environmental and land use statutes contain savings clauses, and many apply some degree of cooperative federalism. If the Ninth Circuit's upside-down approach here were affirmed, such clauses might produce an onslaught of inconsistent state regulatory intrusions on the outer continental shelf or yield a host of litigation demanding compliance with state law, including state common law that imposes duties that conflict with comprehensive federal regulatory schemes. And even if courts ultimately choose to deny the application of overlapping and inconsistent state law, it could still

take years of costly litigation to reach a result that should have been obvious from the start. By reversing the ruling below, the Court can avoid this morass of potential problems.

The danger is magnified, moreover, because States opposed to development of the outer continental shelf could attempt to enact targeted laws that make offshore operations more difficult or economically infeasible—precisely the sort of state interference Congress sought to avoid when making explicit that the outer continental shelf was an area of exclusive federal jurisdiction. *See* Pet. Br. 48–49.

It is one thing for Congress to contemplate and promote cooperation between state and federal law to pursue common objectives within state territory, where state jurisdiction is unquestioned and state sovereignty concerns are paramount. It is quite another to allow States to second guess or supplant otherwise comprehensive federal schemes where they have no authority to regulate. If such turmoil is to be created on the outer continental shelf, Congress must clearly demand it. It has not done so here.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

Steven P. Lehotsky
Michael B. Schon
U.S. CHAMBER LITIGATION CENTER
1615 H St. NW
Washington, DC 20062

Hyland Hunt
Counsel of Record
Ruthanne M. Deutsch
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
(202) 868-6915
hhunt@deutschhunt.com

February 27, 2019

No. 18-389

In the Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,
Petitioner,

v.

BRIAN NEWTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF FREEPORT-MCMORAN OIL & GAS LLC, AMPLIFY ENERGY CORP., BETA OPERATING COMPANY, LLC, DCOR, LLC, ENSIGN UNITED STATES DRILLING (CALIFORNIA), INC., AMERICAN PETROLEUM INSTITUTE, CALIFORNIA INDEPENDENT PETROLEUM ASSOCIATION, INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL OCEAN INDUSTRIES ASSOCIATION, OFFSHORE OPERATORS COMMITTEE, and WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

BALDWIN J. LEE
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
Three Embarcadero Ctr. 12th Floor
San Francisco, CA 94111
(415) 273-7446

JOHN P. ELWOOD
KEVIN A. GAYNOR
JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500W
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amici Curiae
[Additional counsel for *Amici Curiae* listed at end of brief]

TABLE OF CONTENTS

Table of Authorities ii

Interest of *Amici Curiae* 1

Introduction and Summary of Argument 2

Argument 5

I. Consistent with the Statutory Text and Purpose, Every Court Except the Ninth Circuit Has Interpreted OCSLA as Borrowing State Law Only When Necessary to Fill Substantial Gaps in Federal Law 6

II. The Ninth Circuit's Interpretation Gives State Law Supremacy Over Federal Law In An Area Under Exclusive Federal Jurisdiction And Control 10

A. The OCS Is Subject to the Exclusive Jurisdiction and Control of the Federal Government 11

B. Congress Deliberately Rejected the Notion that State Law Could Displace Federal Law on the OCS 15

C. The Ninth Circuit's Interpretation Encourages Strategic Behavior by the States to Frustrate Federal Policy 21

III. The Ninth Circuit's Interpretation Disrupts Employment Relationships Formed In Reliance On Settled Law 23

Conclusion 34

TABLE OF AUTHORITIES

Cases: **Page(s)**

Abramski v. *United States*,
573 U.S. 169 (2014) 14

Aera Energy LLC v. *Salazar*,
642 F.3d 212 (D.C. Cir. 2011) 32

Air Logistics of Alaska, Inc. v. *Throop*,
181 P.3d 1084 (Alaska 2008) 30

Alabama v. *U.S. Dep't of Interior*,
84 F.3d 410 (11th Cir. 1996) 14, 27

Amoco Prod. Co. v. *Vill. of Gambell*,
480 U.S. 531 (1987) 14

Brigham v. *Eugene Water & Elec. Bd.*,
357 F.3d 931 (9th Cir. 2004) 21

Brown v. *Allen Parish Police Jury*,
526 So.2d 1190 (La. Ct. App. 1988) 30

Chevron Oil Co. v. *Huson*,
404 U.S. 97 (1971) ..... *passim*

Cont'l Oil Co. v. *London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969) ..... *passim*

Dolan v. *U.S. Postal Serv.*,
546 U.S. 481 (2006) 14

EP Operating Ltd. P'ship v. *Placid Oil Co.*,
26 F.3d 563 (5th Cir. 1994) 33

Genina Marine Servs., Inc. v. *Arco Oil & Gas Co.*, 499 So.2d 257 (La. Ct. App. 1986) 9

Gulf Offshore Co. v. *Mobil Oil Corp.*,
453 U.S. 473 (1981) ..... *passim*

Cases—Continued: **Page(s)**

Halferty v. *Pulse Drug Co.*,
864 F.2d 1185 (5th Cir. 1989) 21

Holliday v. *MVM, Inc.*,
No. 08-cv-7924, 2010 WL 11519452
(C.D. Cal. June 1, 2010) 22

LeSassier v. *Chevron USA, Inc.*,
776 F.2d 506 (5th Cir. 1985) 9, 18, 20

Lewis v. *United States*,
523 U.S. 155 (1998) ..... *passim*

Maryland v. *Louisiana*,
451 U.S. 725 (1981) 8, 13

Mendiola v. *CPS Sec. Solutions, Inc.*,
340 P.3d 355 (Cal. 2015) 30

Mersnick v. *USProtect Corp.*,
No. 06-cv-3993, 2006 WL 3734396
(N.D. Cal. Dec. 18, 2006) 21

Nat'l Ass'n of Mfrs. v. *Dep't of Defense*,
138 S. Ct. 617 (2018) 19

Nations v. *Morris*,
483 F.2d 577 (5th Cir. 1973) 10, 18, 20

Offshore Logistics, Inc. v. *Tallentire*,
477 U.S. 207 (1986) 18

Pac. Operators Offshore, LLP v. *Valladolid*,
565 U.S. 207 (2012) 6, 15

Paul v. *United States*,
371 U.S. 245 (1963) 22

Perry v. *George P. Livermore, Inc.*,
165 S.W.2d 782 (Tex. Civ. App. 1942) 30

Cases—Continued: **Page(s)**

Rodrigue v. *Aetna Cas. & Sur. Co.*,
395 U.S. 352 (1969) ..... *passim*

Sec'y of the Interior v. *California*,
464 U.S. 312 (1984) 27

Shell Oil Co. v. *Iowa Dep't of Revenue*,
488 U.S. 19 (1988) ..... *passim*

Sullivan v. *Oracle Corp.*,
254 P.3d 237 (Cal. 2011) 32

Ten Taxpayer Citizens Grp. v. *Cape Wind Assocs., LLC*, 373 F.3d 183 (1st Cir. 2004) 4

Tetra Techs., Inc. v. *Cont'l Ins. Co.*,
814 F.3d 733 (5th Cir. 2016) 9, 28

Tidewater Marine Western, Inc. v. *Bradshaw*,
927 P.2d 296 (Cal. 1996) 28

United Ass'n of Journeymen v. *Barr*,
981 F.2d 1269 (D.C. Cir. 1992) 16

United States v. *Alaska*,
521 U.S. 1 (1997) 13, 14

United States v. *Antelope*,
430 U.S. 641 (1977) 20

United States v. *California*,
332 U.S. 19 (1947) 3, 6, 11, 12

United States v. *Christie*,
717 F.3d 1156 (10th Cir. 2013) 19

United States v. *Darby*,
312 U.S. 100 (1941) 9

United States v. *Louisiana*,
339 U.S. 699 (1950) 6, 13

Cases—Continued: **Page(s)**

United States v. *Louisiana*,
363 U.S. 1 (1960) 11

United States v. *Maine*,
420 U.S. 515 (1975) ..... *passim*

United States v. *Texas*,
339 U.S. 707 (1950) 6, 13

Williams v. *Brinderson Constructors, Inc.*,
No. 15-cv-2474, 2015 WL 474789
(C.D. Cal. Aug. 11, 2015) 28

Statutes:

18 U.S.C. §13(a) 20
29 U.S.C. §201 *et seq.* 9
43 U.S.C. §1301 *et seq.* 13
43 U.S.C. §1301(a) 14
43 U.S.C. §1331 *et seq.* 3, 5
43 U.S.C. §1331(a) 14
43 U.S.C. §1332 3
43 U.S.C. §1332(1) 3, 6, 14
43 U.S.C. §1332(3) 22
43 U.S.C. §1333(a) ..... *passim*
43 U.S.C. §1333(a)(2)(A) ..... *passim*
43 U.S.C. §1337(a) 32
43 U.S.C. §1337(b) 32
43 U.S.C. §1349(b) 28
43 U.S.C. §1801 ..... 3, 22
43 U.S.C. §1802 ..... 3, 22
Cal. Lab. Code §500 *et seq.* 27

Regulations: **Page(s)**

29 C.F.R. §785.23 21

30 C.F.R. §560.202 32

Or. Admin. R. 839-020-0042(3) 30

Other Authorities:

99 Cong. Rec. 6963 (1953) 4, 7, 16

Br. for Appellee, *Mesa Operating Ltd. P'ship* v. *U.S. Dep't of the Interior*, No. 89-04775, 1990 WL 10084692 (5th Cir. Mar. 13, 1990) 29

Bureau of Ocean Energy Mgmt., *Alaska OCS Region*, https://www.boem.gov/Alaska-Region/ 30

Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region/ 28

Bureau of Ocean Energy Mgmt., *Pacific OCS Region*, https://www.boem.gov/Pacific-Region/ 30

Cal. Indus. Welfare Comm'n, Public Meeting (Dec. 15, 1999), https://www.dir.ca.gov/iwc/PublicMeeting121599.pdf 27

Cal. Indus. Welfare Comm'n, Public Meeting (Nov. 15, 1999), https://www.dir.ca.gov/iwc/PUBMTG111599.pdf 27

Other Authorities—Continued: **Page(s)**

Calash LLC, *The Economic Impacts of Allowing Access to the Eastern Gulf of Mexico for Oil and Natural Gas Exploration and Development* (2018), https://bit.ly/2GAzRom 33

Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil & Gas Development*, 11 ECOLOGY L. Q. 401 (1984) 11, 12

Dr. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209 (1988) 11, 12

Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts over Offshore Energy Development in the United States, Canada, and Australia*, 7 CONN. J. INT'L L. 255 (1992) 11, 12

Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy*, GREATER NEW ORLEANS, INC. (2014), https://bit.ly/2WSHPiA 25

Executive Order 13795, 82 Fed. Reg. 20,815 (Apr. 28, 2017) 3, 22

Executive Order 9633, 10 Fed. Reg. 12,305 (Oct. 2, 1945) 11

Jessica Resnick-Ault, *U.S. States Slow Trump Offshore Oil Drilling Expansion Plan*, REUTERS (Mar. 12, 2018), https://reut.rs/2ppz5R2 23

Other Authorities—Continued: **Page(s)**

Jim Nicholson, *The Incredible Economic Opportunities of Offshore Energy Exploration*, NAT'L REVIEW (Oct. 1, 2018), https://bit.ly/2tfOJkk 25

Keith Chu, *Will Revenue Sharing Spur More Offshore Drilling?*, GLOBAL ENERGY INSTITUTE, https://bit.ly/2GBakvd 33

Outer Continental Shelf Governors Coalition, *RE: Request for Comments on the 2019 – 2024 Draft Proposed Outer Continental Shelf Oil & Gas Leasing Program* (Mar. 9, 2018), https://bit.ly/2GBcmf9 23

Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945) 3, 11

Proclamation No. 5030, 97 Stat. 1557 (Mar. 10, 1983) 3

Ron Lieber, *Life on Board a Gulf of Mexico Oil Drilling Platform*, FAST COMPANY (Sept. 30, 2000), https://bit.ly/2BwWaYN 25

Stephen Lee & Dean Scott, *Coastal States Link Arms to Oppose Trump Offshore Drilling Plan*, BLOOMBERG ENVIRONMENT (Jan. 8, 2019), https://bit.ly/2BruB3c 23

U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan. 2018), https://bit.ly/2lU8cCV ..... *passim*

U.S. Dep't of the Interior, *Natural Resources Revenue Data: Gulf of Mexico*, https://bit.ly/2ImnkYq 33

Other Authorities—Continued: **Page(s)**

Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953) ..... *passim*

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are companies with oil and gas operations on the Outer Continental Shelf ("OCS") or in the offshore industry, and trade associations whose members operate in, serve, or have other interests in that industry. *Amici curiae* Freeport-McMoRan Oil & Gas LLC, Amplify Energy Corp. (partly through its subsidiary Beta Operating Company, LLC), DCOR, LLC, and Ensign United States Drilling (California), Inc., are companies engaged in the acquisition, exploration, development, and production of oil and gas properties on the OCS, and which employ individuals to work on offshore OCS platforms off the California coast and in the Gulf of Mexico. Several *amici* are defendants in pending litigation in which OCS platform workers assert wage-and-hour claims under California law. Because those cases will likely be affected by the disposition of this case, those *amici* have a direct and substantial interest in this case.

Amici the American Petroleum Institute, California Independent Petroleum Association, Independent Petroleum Association of America, National Association of Manufacturers, National Ocean Industries Association, Offshore Operators Committee, and Western States Petroleum Association are trade associations representing business interests involved or supporting the offshore industry, including crude oil and natural

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than the *amici curiae* or their counsel made a monetary contribution intended to fund the preparation of this brief. The parties were given timely notice and have consented to this filing.

gas producers and oil and natural gas exploration and production companies with operations on the OCS.

Collectively, *amici* participate regularly in legislative, regulatory, and judicial proceedings that may affect their or their members' interests. *Amici* have an interest in ensuring a stable and predictable legal framework governing the offshore industry, to allow businesses and employees to know which labor and employment practices (among other laws) apply to U.S. offshore operations. All *amici* have a strong and direct interest in the question presented here—*i.e.*, the circumstances in which state wage-and-hour laws might apply to operations on the OCS.

INTRODUCTION AND SUMMARY OF ARGUMENT

Oil and gas operations on the OCS play an essential role in the Nation's economy, generating billions of dollars a year for the United States Treasury and employing hundreds of thousands of Americans.[2] OCS operations are also vital to the Nation's energy and national security needs.

More than 70 years ago, this Court recognized that the OCS and its natural resources are "of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world." *United*

---

[2] In addition to generating billions of dollars a year in revenue, the federal government recently estimated that offshore oil and gas operations created approximately 315,000 jobs. U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., ***2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program*** 1-9, 8-4 (Jan. 2018), https://bit.ly/2lU8cCV.

States v. *California*, 332 U.S. 19, 35 (1947). Congress similarly has recognized that offshore oil and gas operations are essential to the Nation's "economic and energy policy goals" and "national security." See 43 U.S.C. §§1332, 1801, 1802. The Executive Branch has long asserted a national interest in the OCS. See, *e.g.*, Exec. Order 13795, 82 Fed. Reg. 20,815 (Apr. 28, 2017); Proclamation No. 5030, 97 Stat. 1557 (Mar. 10, 1983); Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945). Illustrating the significance of the OCS, some commentators have suggested that Congress's assertion of authority over the OCS in 1953 was "more important to the nation than the Louisiana Purchase." Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 23 (1953).

Employers and employees in this large and vital sector of the economy rely upon predictable and easily implemented legal rules to govern their relationships. The federal government likewise benefits from a well-defined legal regime on the OCS, which encourages operators to bid on new leases and expand development, thus helping to meet the Nation's energy needs and bringing in revenue. Congress created such a framework when it enacted the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §1331 *et seq.*, which governs the rights and obligations of those who own, operate, and work on offshore drilling platforms.

Through OCSLA, Congress extended the jurisdiction of the United States and its laws to the OCS, declaring it "an area of exclusive Federal jurisdiction." 43 U.S.C. §§1332(1), 1333(a). OCSLA is "a sweeping

assertion of federal supremacy" over the OCS. *Ten Taxpayer Citizens Grp.* v. *Cape Wind Assocs., LLC*, 373 F.3d 183, 188 (1st Cir. 2004). But because "the Federal Code was never designed to be a complete body of law in and of itself," *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 358 (1969) (quoting 99 Cong. Rec. 6963 (1953)), OCSLA adopts as surrogate federal law the "applicable and not inconsistent * * * laws of each adjacent State." 43 U.S.C. §1333(a). For almost fifty years, every court to consider the question has interpreted that language to mean that state law is adopted as surrogate federal law under OCSLA only when necessary to "supplement[] gaps in the federal law." *Rodrigue*, 395 U.S. at 357; see also *Cont'l Oil Co.* v. *London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1035-1036 (5th Cir. 1969). In concluding otherwise, the Ninth Circuit rejected decades of well-settled precedent, disrupting the widely held expectations of those who operate on the OCS and in related sectors.

In interpreting OCSLA to allow state law to apply on the OCS even in the absence of a "gap" in federal law, the Ninth Circuit misconstrued the text and structure of that statute and ignored the context in which Congress enacted it. Contrary to OCSLA's text, history, and purpose, the Ninth Circuit's decision effectively accords state law supremacy over federal law in an area under exclusive federal jurisdiction. Given the reality that some States will have different, and even diametrically opposed, policy preferences than the federal government regarding OCS activity, this interpretation invites strategic behavior by coastal States designed to frustrate federal policy on the OCS.

Further, by rejecting a legal standard that has provided the choice-of-law framework on the OCS for almost 50 years, the Ninth Circuit's decision disrupts longstanding and mutually beneficial employment relationships carefully tailored to the unique circumstances of living and working offshore.

If the decision below is allowed to stand, OCS operations across the United States will be subject to the varying, and often conflicting, policy preferences of individual States, creating a fragmented and unpredictable legal framework on the OCS. This Court should reject the Ninth Circuit's interpretation of §1333(a)(2)(A) and reaffirm that federal law is paramount on the OCS.

ARGUMENT

When businesses decide whether and how to invest and operate on the OCS, a key threshold question is whether federal or state law applies. The Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.*, defines the body of law applicable to the OCS and the structures thereon, including drilling and production platforms. *Rodrigue* v. *Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969). That Congress designed a legal regime in which federal law is "the exclusive law that govern[s] on the OCS," Br. for Pet'r 19, and thus "prevail[s]" over state law, *Rodrigue*, 395 U.S. at 358, is no surprise.

Before Congress enacted OCSLA, this Court declared in a series of cases that

> under our constitutional arrangement[,] paramount rights to the lands underlying the

> marginal sea are an incident to national sovereignty and * * * their control and disposition in the first instance are the business of the Federal Government rather than the States.

United States v. *Maine*, 420 U.S. 515, 522 (1975); see also *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 339 U.S. 699 (1950) ("*Louisiana I*"); *United States* v. *California*, 332 U.S. 19 (1947). The paramountcy cases, in short, proclaimed that the federal government has "exclusive jurisdiction over the OCS." *Shell Oil Co.* v. *Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). By enacting OCSLA in 1953, Congress emphatically embraced that view.

I. Consistent with the Statutory Text and Purpose, Every Court Except the Ninth Circuit Has Interpreted OCSLA as Borrowing State Law Only When Necessary to Fill Substantial Gaps in Federal Law

A principal purpose of OCSLA was "to define a body of law applicable" to the OCS and the structures fixed thereon. *Rodrigue*, 395 U.S. at 355-356. Consistent with the "constitutional underpinnings" of the paramountcy cases, *Maine*, 420 U.S. at 524, OCSLA extended the jurisdiction of the United States and its laws to the OCS. 43 U.S.C. §§1332(1), 1333(a); see also *Pac. Operators Offshore, LLP* v. *Valladolid*, 565 U.S. 207, 212 (2012); *Shell Oil*, 488 U.S. at 26-27. "It is evident," based on the text and structure of OCSLA, that "federal law is 'exclusive' in its regulation of" the OCS.

Rodrigue, 395 U.S. at 355-357; see also Br. for Pet'r 5-7, 18-23.

Congress recognized, however, that, "because of its limited function in a federal system," federal law might not address the full range of legal issues potentially arising on the OCS. *Rodrigue*, 395 U.S. at 357. As this Court once explained:

> [T]he "whole circle of legal problems" typically resolved under state law could arise on the OCS, because the large crews working on the great offshore structures would "die, leave wills, and pay taxes. They will fight, gamble, borrow money, and perhaps even kill. They will bargain over their working conditions and sometimes they will be injured on the job."

Shell Oil, 488 U.S. at 27 n.8 (quoting Warren M. Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23, 37 (1953)). Because "the Federal Code was never designed to be a complete body of law in and of itself," *Rodrigue*, 395 U.S. at 358 (quoting 99 Cong. Rec. 6963 (1953)), Congress included a choice-of-law provision that allows for the adoption of the "applicable and not inconsistent" laws of the adjacent States. 43 U.S.C. §1333(a)(2)(A).

This Court first had occasion to interpret §1333(a)(2)(A) in 1969. Based on the statutory text, structure, and purpose, this Court explained that state law is incorporated under §1333(a)(2)(A) only when necessary to "supplement[] gaps in the federal law." *Rodrigue*, 395 U.S. at 357; see also Br. for Pet'r 25-26. This Court highlighted the supremacy of federal law

on the OCS by explaining that OCSLA implements the principle that "federal law should prevail" over state law on the OCS. *Rodrigue*, 395 U.S. at 358. Since *Rodrigue*, this Court has reaffirmed that the laws of the adjacent States apply under OCSLA only when necessary "to fill the substantial 'gaps' in the coverage of federal law."[3] *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 480 (1981); see also, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 752 n.26 (1981); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 103-105 (1971).

Shortly after this Court decided *Rodrigue*, the Fifth Circuit addressed whether state law is "applicable and not inconsistent" under §1333(a)(2)(A) when existing federal law provides a comprehensive governing scheme—*i.e.*, when there is no "gap" in federal law. Applying "the recurring theme of *Rodrigue*," the Fifth Circuit held that "the deliberate choice of federal law, federally administered, requires that 'applicable' be read in terms of necessity—necessity to fill a significant void or gap" in federal law. *Cont'l Oil Co.* v. *London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969). When federal law provides both a right and a remedy, the Fifth Circuit explained, the application of state law is neither "needed [n]or permitted." *Id.* at 1035-1036. That principle applies even when

---

[3] This Court's interpretation of §1333(a)(2)(A) is consistent with well-settled principles governing the applicability of state law in federal enclaves, see Br. for Pet'r 20-21, 34-35, as well as this Court's interpretation of other statutes allowing for the adoption of state law in federal enclaves. See, *e.g.*, *Lewis* v. *United States*, 523 U.S. 155, 160 (1998) (explaining that the Assimilative Crimes Act "borrow[s] state law to fill gaps in the federal criminal law that applies on federal enclaves").

state law provides more protection than federal law. See *LeSassier* v. *Chevron USA, Inc.*, 776 F.2d 506, 508-509 (5th Cir. 1985). And until the Ninth Circuit's decision in this case, every court to consider the issue has understood §1333(a)(2)(A) as allowing for the adoption of state law only when necessary to supplement gaps in the federal law. *E.g.*, *Tetra Techs., Inc.* v. *Cont'l Ins. Co.*, 814 F.3d 733, 738 (5th Cir. 2016); *Genina Marine Servs., Inc.* v. *Arco Oil & Gas Co.*, 499 So.2d 257, 259-260 (La. Ct. App. 1986); see also Br. for Pet'r 27-28.[4]

Contrary to long-settled precedent and widely held expectations of employers and employees alike, the Ninth Circuit held here that workers employed on OCS platforms may bring claims under state wage-and-hour laws, Pet. App. 1-2, despite the applicability of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §201 *et seq.*, "a comprehensive legislative scheme," *United States* v. *Darby*, 312 U.S. 100, 109 (1941). The Ninth Circuit expressly "reject[ed] the proposition" that state law applies on the OCS only if "necess[ary] to fill a significant void or gap" in federal law. Pet. App. 2 (citing *Cont'l Oil*, 417 F.2d at 1036).

The Ninth Circuit's decision is already having—and if allowed to stand, will continue to have—far-reaching practical and financial consequences for OCS employers and the thousands of employees working offshore

---

[4] Prior to the panel's decision here, district courts within the Ninth Circuit had consistently followed *Continental Oil*. See Pet. App. 20 n.13.

pursuant to generous contractual and other arrangements predicated on a legal framework the panel discarded.

II. The Ninth Circuit's Interpretation Gives State Law Supremacy Over Federal Law In An Area Under Exclusive Federal Jurisdiction And Control

The Ninth Circuit's interpretation of §1333(a) effectively "accord[s] state law supremacy over federal law" and "cede[s] the United States' jurisdiction over the OCS to state agencies," Pet. App. 23, contrary to OCSLA's text, purpose, and history. In OCSLA, Congress "emphatically implemented its view" that "the OCS [is] subject to the exclusive jurisdiction and control of the Federal Government." *Shell Oil*, 488 U.S. at 26-27. Embedded in the statute is the principle that "federal law should prevail" over state law, particularly where, as here, a federal statutory scheme does apply. *Rodrigue*, 395 U.S. at 358; accord *Nations* v. *Morris*, 483 F.2d 577, 590 (5th Cir. 1973) (stating that "[t]here is no need to bring aboard" state law on the OCS "to cause liability to be fixed where Congress never intended it").

In the Ninth Circuit's mistaken view, even when a comprehensive federal scheme governs claims arising on the OCS, state law will control so long as it "pertain[s] to the subject matter at hand," Pet. App. 21-27, and is not "inconsistent with" existing federal law (under the Ninth Circuit's diluted reading of "incon-

sistent," see Pet. App. 27-39). The Ninth Circuit's interpretation cannot be reconciled with OCSLA's text and purpose.

A. The OCS Is Subject to the Exclusive Jurisdiction and Control of the Federal Government

To understand why Congress chose to make federal law paramount on the OCS, it is necessary to understand the context in which OCSLA was passed. Beginning in the 1930s, a sharp dispute arose between the coastal States and the federal government over jurisdiction and ownership of submerged coastal lands and their natural resources. *United States* v. *Louisiana*, 363 U.S. 1, 5, 16-17 (1960); see also Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts over Offshore Energy Development in the United States, Canada, and Australia*, 7 CONN. J. INT'L L. 255, 257 (1992); Dr. Edward A. Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL. L. 209, 212-214 (1988); Daniel S. Miller, *Offshore Federalism: Evolving Federal-State Relations in Offshore Oil & Gas Development*, 11 ECOLOGY L. Q. 401, 407 (1984). The impetus for the dispute was the discovery of oil on the seabed, which led various coastal States to lease the land for exploration. *California*, 332 U.S. at 25, 38.

The controversy boiled over after World War II, when President Truman declared that the OCS was subject to the jurisdiction and control of the United States. Proclamation No. 2667, 59 Stat. 884 (Sept. 28, 1945); see also Exec. Order 9633, 10 Fed. Reg. 12,305-01 (Oct. 2, 1945). President Truman's proclamation

"effectively foreclosed any future state claims to the [OCS]," Miller, *Offshore Federalism*, 11 ECOLOGY L. Q. at 407, and thus defined "the controversy as a strictly domestic conflict between the federal and coastal state governments," Fitzgerald, *The Tidelands Controversy*, 19 ENVTL. L. at 214. Faced with an uncooperative Congress, "the Truman administration resorted to litigation." *Ibid.*

This Court settled the debate in 1947, holding that the federal government, and not the States, had "paramount rights in and power over" submerged coastal lands, including submerged lands within the three-mile belt and the OCS.[5] See *California*, 332 U.S. at 33-34, 38-39; see also *Maine*, 420 U.S. at 519-520. Because of the significant matters of national concern involved—*i.e.*, commerce, national security, and international law—this Court rejected the idea that the "local interests" supporting a State's control over inland waters extended to submerged coastal lands.[6] *California*, 332 U.S. at 34-36. Three years later, this Court reaffirmed that submerged coastal lands are

> a national, not a state concern. National interests, national responsibilities, national

---

[5] The coastal States never seriously contested the federal government's exclusive jurisdiction over the OCS—*i.e.*, the lands and natural resources lying beyond the three-mile belt. See Br. for Pet'r at 5; see also *Maine*, 420 U.S. at 519, 524-526.

[6] Changes in federal policy concerning offshore oil and gas exploration and production have often coincided with issues of international significance. See Fitzgerald, *The Seaweed Rebellion*, 7 CONN. J. INT'L L. at 257, 262-263 (discussing increased offshore activity in response to World War II and the 1973 oil embargo).

> concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.

Louisiana I, 339 U.S. at 704; see also *Texas*, 339 U.S. at 719-720. These cases established that, as a matter of constitutional structure, "paramount rights" to the OCS are "an incident to national sovereignty," meaning that the control of the OCS is "in the first instance * * * the business of the Federal Government rather than the States." *Maine*, 420 U.S. at 522; accord *United States* v. *Alaska*, 521 U.S. 1, 5 (1997) ("Ownership of submerged lands * * * is an essential attribute of sovereignty." (citation omitted)). In other words, the paramountcy cases established the federal government's "exclusive jurisdiction over the OCS." *Shell Oil*, 488 U.S. at 26; see also *Gulf Offshore*, 453 U.S. at 479 n.7 (stating that the paramountcy cases held that "the Federal Government enjoyed sovereignty and ownership" of the OCS "to the exclusion of adjacent States").

In response to these decisions, Congress passed the Submerged Lands Act, 43 U.S.C. §1301 *et seq.*, which ceded "any federal interest in the lands within three miles of the coast, while confirming the Federal Government's interest in the area seaward of the 3-mile limit." *Maryland*, 451 U.S. at 730; cf. *Alaska*, 521 U.S. at 6 (the Submerged Lands Act "establishes States' title to submerged lands beneath a 3-mile belt of the territorial sea, which would otherwise be held by the United States" (citation omitted)). Shortly thereafter,

Congress enacted OCSLA, which extended the jurisdiction of the United States and its laws to the OCS—defined as the submerged lands lying seaward of the three-mile boundary, 43 U.S.C. §§1301(a), 1331(a)—and declared it "an area of exclusive Federal jurisdiction." *Id.* §§1332(1), 1333(a)(1). Thus, the three-mile boundary is where "the OCS commences," *Amoco Prod. Co.* v. *Vill. of Gambell*, 480 U.S. 531, 547 (1987), and "the states' jurisdiction ends," *Alabama* v. *U.S. Dep't of Interior*, 84 F.3d 410, 412 (11th Cir. 1996). Importantly, both pieces of legislation "embraced rather than repudiated" the principle that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty." See *Maine*, 420 U.S. at 524-527. Neither statute "call[s] into question" the federal government's "paramount sovereign authority over submerged lands beneath the territorial sea." *Alaska*, 521 U.S. at 35; see also *Shell Oil*, 488 U.S. at 27.

The fact that Congress endorsed and implemented through OCSLA the constitutional principles of the paramountcy cases is crucial context informing any interpretation of the statute. See *Abramski* v. *United States*, 573 U.S. 169, 179 (2014); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). This Court has counseled against reading the text of a statute in a manner that would "dramatically separate the statute from its intended purpose." *Lewis* v. *United States*, 523 U.S. 155, 160 (1998). To that end, OCSLA must be understood in the context of this Court's decisions resolving "the clash between national sovereignty and states' rights" on the OCS. *Cont'l Oil*, 417 F.2d at 1036. In-

deed, this Court has consistently and repeatedly interpreted OCSLA in light of this historical background. See, *e.g.*, *Shell Oil*, 488 U.S. at 26-27; *Gulf Offshore*, 453 U.S. at 479 n.7. This background demonstrates that Congress's choice in OCSLA "to retain exclusive federal control of the administration of the [OCS]," *Gulf Offshore*, 453 U.S. at 479 n.7, "affirm[ed] the Federal Government's authority and control over the [OCS]," *Pac. Operators*, 565 U.S. at 212. And because "the OCS [is] subject to the exclusive jurisdiction and control of the Federal Government," *Shell Oil*, 488 U.S. at 27, "federal law should prevail" over state law, *Rodrigue*, 395 U.S. at 358.

B. Congress Deliberately Rejected the Notion that State Law Could Displace Federal Law on the OCS

The historical context also demonstrates that Congress consciously adopted a legal framework that ensured that federal law had an overriding and controlling claim over legal disputes arising on the OCS.

After this Court determined that "the OCS was subject to the exclusive jurisdiction and control of the Federal Government, Congress was faced with the problem of which civil and criminal laws should govern activity on the OCS sites." *Shell Oil*, 488 U.S. at 27. This issue was "the most challenging question of legal theory" Congress faced in drafting OCSLA.[7] Christopher,

---

[7] The choice-of-law issue had "political ramifications" because "the law to be applied had a bearing on the question whether the

supra, at 37. "In choosing a body of law to govern leasing and other activities on the [OCS], Congress ultimately settled on a combined federal-state regime." *United Ass'n of Journeymen* v. *Barr*, 981 F.2d 1269, 1270 (D.C. Cir. 1992) (citing Christopher, *supra*, at 37-43). Congress made applicable "the whole body of Federal law" to the OCS "as well as state law where necessary." *Rodrigue*, 395 U.S. at 357, 362; see also 43 U.S.C. §1333(a).

Before settling on this "unique combination of federal and state laws," Christopher, *supra*, at 41, Congress rejected a blanket application of either maritime law or state law to the OCS. See *Rodrigue*, 395 U.S. at 355, 358-359, 361-366. One reason Congress found "the contemplated extension of admiralty law to the OCS * * * unsatisfactory" was the concern that "[t]he so-called social laws necessary for protection of the workers and their families would not apply." Pet. App. 23 (quoting 99 Cong. Rec. 6963). But the Senate's concern with the inapplicability of these laws on the OCS did not, as the Ninth Circuit claimed, "emphasize[] the importance of having state law apply to the OCS * * *." Pet. App. 24. Instead, Congress alleviated the problem by incorporating "the whole body of Federal law" to the OCS, which included the FLSA. *Rodrigue*, 395 U.S. at 362; cf. *Cont'l Oil*, 417 F.2d at 1035 (rejecting a reading of §1333(a)(2)(A) that would "impute[] to Congress the purpose generally to export the whole body of adjacent [state] law onto the [OCS]").

---

coastal states were to share in the revenues of the outer Continental Shelf." Christopher, *supra*, at 37, 40-41; see also *Shell Oil*, 488 U.S. at 27-28.

To be sure, Congress was aware of "the special relationship between the men working on these artificial islands and the adjacent shore to which they commute to visit their families * * * ." See *Rodrigue*, 395 U.S. at 355, 363, 365. Seizing on this issue, opponents of OCSLA, led by Louisiana Senator Russell Long, had argued in favor of applying state law on the OCS, enforced by "the officials of such State." *Id.* at 358-359. The Department of Justice, on the other hand, opposed a regime that would place the OCS under "the jurisdiction of state courts, state substantive law, and state law enforcement." *Id.* at 364-365. Congress ultimately agreed with the Administration's view, and rejected "the notion of supremacy of state law administered by state agencies." *Cont'l Oil*, 417 F.2d at 1036 (citing *Rodrigue*, 395 U.S. at 358); see also 43 U.S.C. §1333(a). In doing so, Congress did not ignore the close ties between the workers and the coastal States. Congress's recognition of those ties "manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law." *Gulf Offshore*, 453 U.S. at 479 n.7 (citing *Rodrigue*, 395 U.S. at 365).

Despite the fact that Congress declined to adopt an approach that would result in state substantive law displacing federal law on the OCS, see *Rodrigue*, 395 U.S. at 362; *Cont'l Oil*, 417 F.2d at 1036, the Ninth Circuit's decision accomplishes just that. The text and structure of OCSLA establish that "federal law is 'exclusive' in its regulation" of the OCS, meaning that state law applies only if federal law does not "first apply." See *Rodrigue*, 395 U.S. at 356-359, 366. Stated differently, the existence of a comprehensive federal statutory scheme governing the dispute is the primary

"obstacle to the application of state law by incorporation as federal law" through OCSLA. *Id.* at 366; accord *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 217-218 (1986) (explaining that in *Rodrigue*, federal law did not apply, and thus did not "preclude the application of state law as adopted federal law through OCSLA").

When existing federal law provides a comprehensive governing scheme, "there is no gap—not even a tiny one"—for state law to fill. *Nations*, 483 F.2d at 589. In that situation, "[t]here is no need to bring aboard" state law "to cause liability to be fixed where Congress never intended it." *Id.* at 590; compare *Huson*, 404 U.S. at 101, 103-105 (applying state law where federal law provided "no particular statute of limitations"), and *Rodrigue*, 395 U.S. at 359-360, 366 (applying state law because of the "inapplicability" of federal law), with *LeSassier*, 776 F.2d at 509 (refusing to adopt state law "where Congress provided a specific statutory provision" that addressed the dispute), and *Nations*, 483 F.2d at 589-590 (refusing "to impose outside state oriented obligations" where a federal statute provided "a complete body of law"). The fact that state law "duplicate[s] or supplement[s]" federal law, and thus provides "superior awards," does not create a "gap" justifying the adoption of state law. See *LeSassier*, 776 F.2d at 508-509.

By allowing state law to supersede federal law on the OCS so long as it "pertain[s] to the subject matter at hand," Pet. App. 21, and "embraces a more protective standard" than federal law, Pet. App. 39, the Ninth Circuit's interpretation inverts the analysis and

frustrates Congressional intent. The application of state law on the OCS is "subject to the absence of 'inconsistent' and applicable federal law," *Huson*, 404 U.S. at 103, and not the other way around. As the Fifth Circuit explained when it rejected the same argument almost 50 years ago, the Ninth Circuit's reading of §1333(a)(2)(A) "accords initially a superiority to adjacent state law" because "the question of federal law comes into play only after this process excludes state law." *Cont'l Oil*, 417 F.2d at 1035-1036. This interpretation effectively reads the word "applicable" out of the statute, "put[ting] almost 100% Emphasis on the not inconsistent with federal laws element of [§1333(a)(2)(A)]," *id.* at 1035 (internal quotation marks and alterations omitted), an approach this Court has long disfavored. Cf. *Nat'l Ass'n of Mfrs.* v. *Dep't of Defense*, 138 S. Ct. 617, 632 (2018) ("[T]he Court is obliged to give effect, if possible, to every word Congress used." (citation and internal quotation marks omitted)).

The Ninth Circuit's interpretation is also at odds with the operation of other statutes that use state law to fill gaps in federal law. Take, for example, the Assimilative Crimes Act ("ACA"), on which the panel here relied. Pet. App. 28. As in OCSLA, Congress decided in the ACA to "borrow from preexisting state law," rather than "try[] to write an exhaustive criminal code for federal enclaves." *United States* v. *Christie*, 717 F.3d 1156, 1170 (10th Cir. 2013) (Gorsuch, J.). Much like OCSLA, the ACA "borrow[s] state law to fill gaps in the federal criminal law that applies on federal enclaves." *Lewis*, 523 U.S. at 160. But it does so only to the extent that a defendant's acts or omissions are

"not made punishable by any enactment of Congress." 18 U.S.C. §13(a).

In *Lewis* v. *United States*, this Court rejected the argument—similar to the Ninth Circuit's reading of OCSLA here—that the ACA assimilates state law whenever that law does not "make criminal the same 'precise acts'" as those made criminal by federal law. See 523 U.S. at 162-163. Such a reading of the statute, this Court explained, would allow for the adoption of state law "even where there is no gap to fill," and neither the ACA's language nor its purpose warranted an interpretation that would "significantly broaden[]" the reach of state law into federal enclaves. *Id.* at 163-164. This Court concluded that it was "fairly obvious" that the ACA did not assimilate state law "where both state and federal statutes seek to punish approximately the same wrongful behavior[.]" *Id.* at 165.

The same principles apply to OCSLA's choice-of-law provision. When a comprehensive federal statutory scheme applies on the OCS—such as the FLSA—the application of state law is neither "needed [n]or permitted." *Cont'l Oil*, 417 F.2d at 1035-1036; see also *LeSassier*, 776 F.2d at 509; *Nations*, 483 F.2d at 590. A litigant (or a court) cannot create a gap simply by showing that state law is more protective than federal law. See *LeSassier*, 776 F.2d at 508-509 cf. *United States* v. *Antelope*, 430 U.S. 641, 670 n.13 (1977) (rejecting the argument that state criminal law may apply in federal enclaves to the extent the law is "more lenient than federal law" (internal quotation marks omitted)). By reading §1333(a) to allow for the incorporation of state law "to fill nonexistent gaps," *Lewis*,

523 U.S. at 163, the Ninth Circuit impermissibly expanded the reach of state law on the OCS.

C. The Ninth Circuit's Interpretation Encourages Strategic Behavior by the States to Frustrate Federal Policy

The practical consequences are real. The Ninth Circuit's interpretation gives California law supremacy over a federal regulation explicitly providing that employees who reside on their employers' premises "for extended periods of time" need not be paid for time spent sleeping or otherwise off duty. See Pet. App. 38-39; 29 C.F.R. §785.23; see also *Brigham* v. *Eugene Water & Elec. Bd.*, 357 F.3d 931, 940-941 (9th Cir. 2004); *Halferty* v. *Pulse Drug Co.*, 864 F.2d 1185, 1190-1191 (5th Cir. 1989). In effectively overruling federal law, the panel's reading invites workers (and creative plaintiff's lawyers) to retroactively claim a host of extra-contractual rights based in state employment or other laws following changes in state substantive law. If allowed to stand, the decision will trigger new waves of litigation—and the threat of ever-mounting retroactive liability—every time a State changes its interpretation of its wage, hour, and other employment laws.

The federal-state conflict is stark, where (as here) a federal scheme allows excluding non-working hours from overtime, but state law compels the opposite approach. The Ninth Circuit's decision departs from cases holding that California state wage-and-hour laws could not apply in other federal enclaves. *E.g.*, *Mersnick* v. *USProtect Corp.*, No. 06-cv-3993, 2006 WL

3734396, at *6-8 (N.D. Cal. Dec. 18, 2006) (holding that California wage-and-hour laws did not apply on Air Force base because in federal enclaves, "state regulation is barred without 'specific congressional action' (quoting *Paul* v. *United States*, 371 U.S. 245, 263 (1963))); see also *Holliday* v. *MVM, Inc.*, No. 08-cv-7924, 2010 WL 11519452, at *3-5 (C.D. Cal. June 1, 2010) (holding that California's meal and rest break laws were not "applicable" in federal enclave); cf. *Rodrigue*, 395 U.S. at 355 (fixtures on OCS treated as "federal enclaves").

In practice, some States have—and likely will always have—different policy preferences than the federal government regarding OCS activity. By interpreting §1333(a) in a manner that effectively gives state law supremacy over federal law, the Ninth Circuit's interpretation opens the door to strategic behavior, inviting States to promulgate facially neutral but effectively targeted laws that increase the difficulty and cost of OCS operations.

The concern is not theoretical. In OCSLA, Congress recognized the public interest in the "expeditious and orderly development" of the OCS—"a vital national resource." 43 U.S.C. §1332(3); see also *id.* §§1801-1802. Relying on that congressional policy, the administration has adopted a policy to expand activities on the OCS. See U.S. Dep't of the Interior and Bureau of Ocean Energy Mgmt., *2019-2024 National Outer Continental Shelf Oil and Gas Leasing Draft Proposed Program* (Jan. 2018) ("Draft Proposed Program"), https://bit.ly/2lU8cCV; see also Exec. Order 13795, 82 Fed. Reg. 20,815 (Apr. 28, 2017). While some coastal

States have expressed support for the plan,[8] others have taken steps "aimed at blocking oil and gas drilling off their coasts" through state legislation. Stephen Lee & Dean Scott, *Coastal States Link Arms to Oppose Trump Offshore Drilling Plan*, BLOOMBERG ENVIRONMENT (Jan. 8, 2019), https://bit.ly/2BruB3c; see also, *e.g.*, Jessica Resnick-Ault, *U.S. States Slow Trump Offshore Oil Drilling Expansion Plan*, REUTERS (Mar. 12, 2018), https://reut.rs/2ppz5R2 (noting that "California and other states have said they would deny needed permits for onshore services and transport").

In short, the Ninth Circuit's interpretation transforms a statute "intended to provide for the orderly development of offshore resources," *Shell Oil*, 488 U.S. at 27 (citation and internal quotation marks omitted), into a regime of jurisdictional chaos, inviting States to assert ever-increasing authority over commercial activities in an area Congress reserved for primary federal jurisdiction and control.

III. The Ninth Circuit's Interpretation Disrupts Employment Relationships Formed In Reliance On Settled Law

For decades, employers and employees on OCS drilling and production platforms have implemented com-

---

[8] See, *e.g.*, Outer Continental Shelf Governors Coalition, *RE: Request for Comments on the 2019 – 2024 Draft Proposed Outer Continental Shelf Oil & Gas Leasing Program* (Mar. 9, 2018), https://bit.ly/2GBcmf9 (statement from the Governors of Alabama, Alaska, Louisiana, Maine, Mississippi, and Texas noting general support for the Draft Proposed Program).

pensation and benefit structures under a shared understanding of substantive background law. Whether by arms-length negotiated contracts, collective bargaining, or other arrangements, these policies have been tailored to the offshore industry, recognizing (among other things) that workers often temporarily reside on premises. The terms of these arrangements generally are far more favorable—including with respect to wages, overtime, and other benefits—than those seen in non-OCS industries typically covered by state wage-and-hour laws. By rejecting the legal principles on which these relationships were based, and potentially exposing employers to massive retroactive liability for reasonably relying on longstanding law, the Ninth Circuit undermined the stability of those relationships, with tremendous practical and financial consequences.

Oil and gas operations on the OCS present unique opportunities and challenges. Production platforms affixed to the OCS operate 24 hours a day and are often in remote locations miles from the coast. While some employees may have the option to return home each night, in other instances, it may be impractical or undesirable to commute. For example, employees may prefer not to commute given travel time and logistics. Others may not reside near enough to allow commuting, for instance choosing to live in a less expensive inland area rather than in a California coastal city such as Santa Barbara. As a result, employees often work agreed-upon shifts, or "hitches," in which the employees work, eat, sleep, and live on the platforms for a specified number of days—typically followed by an equal number of days off. See Pet. App. 3 (14-day

shifts on the platform with employees scheduled to work 12 hours during a 24-hour period, followed by 14 days at home); see also Ron Lieber, *Life on Board a Gulf of Mexico Oil Drilling Platform*, FAST COMPANY (Sept. 30, 2000), https://bit.ly/2BwWaYN.

In recognition of the particular circumstances of work on OCS drilling platforms, employees receive and enjoy above-market salaries, generous benefits, and abundant time off. Long before the decision at issue here, OCS employees received hourly rates "well above the state and federal minimum wage" and "premium rates for overtime hours." Pet. App. 20. The federal government recently estimated that offshore oil and gas workers earn more than 150% of the average hourly wage of other employees,[9] and a study examining the economic impacts of energy activity in Louisiana estimated that the average wage earned by employees in the oil and gas extraction area was 180% of the overall average.[10]

---

[9] Draft Proposed Program at 8-4, https://bit.ly/2lU8cCV; see also Jim Nicholson, *The Incredible Economic Opportunities of Offshore Energy Exploration*, NAT'L REVIEW (Oct. 1, 2018), https://bit.ly/2tfOJkk (stating that "natural gas and oil exploration jobs offer average salaries of $116,000 a year, without necessarily requiring a college degree"). Offshore production also "increases the economic contribution to local economies" through onshore jobs, spending and investment, and tax revenue. Draft Proposed Program at 8-5, https://bit.ly/2lU8cCV.

[10] Eric N. Smith, *Louisiana – The Status of the State: A Report on the Impact of Energy Activity on the State's Economy* 46, GREATER NEW ORLEANS, INC. (2014), https://bit.ly/2WSHPiA.

Moreover, during the non-working (*e.g.*, sleeping and recreation) hours within a hitch that form the basis for this lawsuit, employees can use their time as they see fit. The platforms are equipped with various amenities for employees to use free of charge, including cable television, internet access, and fitness and recreation facilities, allowing employees to engage cost-free in many of the same personal and leisure activities they enjoy on land. Employees live and eat rent-free during shifts, with employers providing lodging and bathing facilities, meals, and cleaning services at no cost to employees. And when the hitch is over, the employee returns home to spend an equivalent number of days off.

Employers and employees in the offshore industry have crafted these mutually beneficial wage-and-benefit policies based on a shared understanding of the governing legal framework and the industry's practical and financial realities. By altering the background legal framework, the Ninth Circuit's decision is all but certain to significantly disrupt those relationships. Overnight, employers in the Ninth Circuit became subject to state wage-and-hour laws designed for conventional (*e.g.*, 9-to-5) employment but ill-tailored to the OCS's unique working environment.

Before the Ninth Circuit's decision, interested parties understood that, although they may apply to workers employed in California's "offshore" areas, California's wage-and-hour laws did not extend to federal "offshore" areas. As explained above, the paramountcy cases conclusively established, as a matter of "national

sovereignty," the federal government's exclusive jurisdiction and control over the *entirety* of the OCS. See *Maine*, 420 U.S. at 519-524. Consistent with this framework, owners and operators of offshore oil and gas platforms have long recognized the distinction between federal "offshore" areas and California "offshore" areas. Cf. *Sec'y of the Interior* v. *California*, 464 U.S. 312, 315-316 (1984) (the area extending "three geographical miles seaward from the coastline * * * belongs to the states, while the OCS belongs to the federal government"); *Alabama*, 84 F.3d at 412 (the OCS "begin[s] where the states' jurisdiction ends, i.e., more than three miles from the coast").

In 1999, for example, the California Industrial Welfare Commission ("IWC") held public hearings concerning Assembly Bill 60, known as the "Eight-Hour Day Restoration and Workplace Flexibility Act of 1999." See Cal. Lab. Code §500 *et seq.* The record of those hearings demonstrates that employers recognized the crucial distinction between "offshore" production taking place "within the state water, meaning within the three-mile limit of the coastline" (which would be subject to plenary state regulation) and offshore activity "on the outer continental shelf or federal waters" (which would not).[11] Cal. Indus. Welfare Comm'n, Public Meeting Tr. at 129:8-11 (Dec. 15,

---

[11] IWC commissioners likewise limited their comments to "workers *in the state of California*." Cal. Indus. Welfare Comm'n, Public Meeting Tr. at 19:17 (Nov. 15, 1999), https://bit.ly/2TREu1a (emphasis added); see also Cal. Indus. Welfare Comm'n, Public Meeting Tr. at 135:18-19 (Dec. 15, 1999), https://bit.ly/2BBKMei (stating that the bill covered "all workers * * * in California").

1999), https://bit.ly/2BBKMei. The California Supreme Court itself has expressed uncertainty regarding the reach of California employment law to offshore activity outside the State's territorial boundaries. See *Tidewater Marine Western, Inc.* v. *Bradshaw*, 927 P.2d 296, 308-309 (1996).[12]

Further, the vast majority of America's coastal waters currently open to offshore oil and gas production activity are located off the coasts of States within the territorial jurisdiction of the Fifth Circuit.[13] As a result, OCSLA litigation occurs primarily in that circuit. See 43 U.S.C. §1349(b) (suits arising out of oil and gas operations on the OCS may be instituted "in the judicial district of the State nearest the place the cause of action arose"). And since 1969, the Fifth Circuit consistently has interpreted §1333(a)(2)(A) as adopting state law on the OCS "only when needed 'to fill a significant void or gap' in federal law." Br. for Pet'r 27-28 (quoting *Cont'l Oil*, 417 F.2d at 1036); see also, *e.g.*, *Tetra Techs.*, 814 F.3d at 738. Thus, because of the practical realities of OCS oil and gas operations and OCSLA litigation, the Ninth Circuit's decision upsets longstanding expectations on the OCS.[14]

---

[12] Notably, the court in *Tidewater* did not analyze, or even mention, OCSLA. See 927 P.2d at 300-302, 308-309.

[13] See Draft Proposed Program at 4-1, 4-7, https://bit.ly/2lU8cCV; Bureau of Ocean Energy Mgmt., *Gulf of Mexico OCS Region*, https://www.boem.gov/Gulf-of-Mexico-Region/.

[14] Numerous district courts in the Ninth Circuit have followed the *Continental Oil* decision. See, *e.g.*, *Williams* v. *Brinderson Constructors, Inc.*, No. 15-cv-2474, 2015 WL 474789, at *4 (C.D. Cal. Aug. 11, 2015); see also Pet. App. 20 n.13. In addition, the

The disruptive effects of the Ninth Circuit's decision are numerous. The Ninth Circuit's interpretation would subject companies and their employees to inconsistent substantive obligations depending on where operations are located, undermining expectations and disrupting contractual and other arrangements.[15] By allowing state law to oust existing federal law on the OCS, the Ninth Circuit's decision exacerbates the practical problem that "federal officials will be required to administer the unfamiliar, complicated, and varying provisions of state law." Christopher, *supra*, at 42.

Even within the Ninth Circuit, OCS operations now face different legal rules, depending on their location. Four States within the Ninth Circuit's jurisdiction—

---

federal government has understood *Continental Oil* to be the governing standard on the OCS. *E.g.*, Br. for Appellee, *Mesa Operating Ltd. P'ship* v. *U.S. Dep't of the Interior*, No. 89-04775, 1990 WL 10084692, at *33-34 (5th Cir. Mar. 13, 1990) ("Local laws thus are incorporated only to fill the substantial gaps in the coverage of federal law[.]" (citation, internal quotation marks, and alterations omitted)).

[15] Granted, Congress recognized in OCSLA that in some circumstances, an interest in "national uniformity" would give way to other considerations. Pet. App. 38 (quoting *Gulf Offshore*, 453 U.S. at 487; *Huson*, 404 U.S. at 104); Christopher, *supra*, at 40-41. But Congress assured a minimum degree of uniformity by "incorporati[ng] * * * the law of adjacent States *to fill gaps in federal law*." See *Gulf Offshore*, 453 U.S. at 479 n.7, 486-488 (emphasis added).

California, Oregon, Washington, and Alaska—are adjacent to offshore OCS oil and gas activity.[16] Stark differences exist in their laws, including about compensation for employees who reside on an employer's premises for extended periods of time. Compare *Mendiola* v. *CPS Sec. Solutions, Inc.*, 340 P.3d 355, 361-366 (Cal. 2015) (on-call hours, including "sleep time," represent "hours worked" for overtime purposes), with *Air Logistics of Alaska, Inc.* v. *Throop*, 181 P.3d 1084, 1092-1094 (Alaska 2008) (sleep and recreation time need not be compensated as overtime work); see also Or. Admin. R. 839-020-0042(3) ("An employee who resides on the employer's premises * * * for extended periods of time is not considered as working all the time the employee is on the premises.").[17]

If the panel decision stands, offshore employers will be faced with changing not only base pay and overtime arrangements, but also a range of other employment terms, such as benefit packages. Some benefits provided to offshore workers—such as life insurance policies provided by third-party financial institutions—are tied to a worker's base pay. Thus, reducing base pay to offset the additional cost of paying for sleep time

---

[16] See Bureau of Ocean Energy Mgmt., *Pacific OCS Region*, https://www.boem.gov/Pacific-Region/; Bureau of Ocean Energy Mgmt., *Alaska OCS Region*, https://www.boem.gov/Alaska-Region/.

[17] Other States that are adjacent to offshore OCS oil and gas activity have applied federal law to determine hours worked for employees who reside on their employer's premises. See, *e.g.*, *Brown* v. *Allen Parish Police Jury*, 526 So.2d 1190, 1192-1193 (La. Ct. App. 1988); *Perry* v. *George P. Livermore, Inc.*, 165 S.W.2d 782, 784-785 (Tex. Civ. App. 1942).

would have cascading collateral consequences, often to the employee's detriment. The decision's ripple effects stretch beyond employees of platform operators; contractors providing food service, cleaning, and other services on platforms now face uncertainty about paying their own employees.

Moreover, if applied retroactively,[18] the Ninth Circuit's decision could inflict hundreds of millions of dollars of liability on employers who structured operations in reliance on cases like *Rodrigue* and *Continental Oil*. Such a result would give employees—already generously compensated under existing arrangements—a windfall of backpay, plus interest and penalties. Going forward, it is doubtful that employers could offer such generous compensation and benefit terms, if relationships are subject to state-law overtime and other requirements enacted without regard for the unique circumstances of OCS work. Thus, the Ninth Circuit's decision not only creates the potential for significant retroactive liability, it is already disrupting employer-employee relationships, industry-wide.

Both sides would benefit from having a uniform choice-of-law regime governing the OCS. Otherwise, both employers and employees will face a different legal regime depending on whether they are operating in the Gulf of Mexico or off the Pacific Coast—and which neighboring state is closest to that location. In-

---

[18] The Ninth Circuit reserved for the district court to decide in the first instance "whether [the] holding should be applied retrospectively." Pet. App. 43 (citing *Huson*, 404 U.S. at 106-107).

deed, because individual employees may move between the Gulf of Mexico and the Pacific Coast on a short-term basis, they could be subject to multiple inconsistent pay structures in a given year or month depending on which State was closest to their platform, even if all work occurred in an area under exclusively federal jurisdiction.[19] Increasing the cost of OCS operations could also shorten the economic life of some offshore facilities, harming not only employees, but also the federal government, and ultimately taxpayers.

The possibility of expanded OCS operations under current U.S. policy will only heighten the need for uniformity and consistency in the governing legal framework. OCSLA authorizes the Secretary of the Interior to offer and administer oil and gas leases on the OCS. *Aera Energy LLC* v. *Salazar*, 642 F.3d 212, 214 (D.C. Cir. 2011). Under such leases, private companies pay "an up-front bonus, annual rentals, and royalties on oil and natural gas actually produced" during the lease term. *Ibid.* (citing 43 U.S.C. §1337(a), (b)); see also 30 C.F.R. §560.202 (describing bidding systems). Offshore activity generates billions in federal revenue; royalties from OCS drilling "constitute the country's second-largest single source of revenue, exceeded only

---

[19] For instance, Pacific Coast platform operators may hire specialist teams from the Gulf of Mexico to perform particular tasks, such as plugging and abandonment of wells, on a short-term or extended basis. Such workers could be subject to certain provisions of California employment law beginning with their first full day of work. *E.g.*, *Sullivan* v. *Oracle Corp.*, 254 P.3d 237 (Cal. 2011).

by the federal income tax."[20] Keith Chu, *Will Revenue Sharing Spur More Offshore Drilling?*, GLOBAL ENERGY INSTITUTE, https://bit.ly/2GBakvd; see also Draft Proposed Program at 1-9, https://bit.ly/2lU8cCV. "The OCSLA thus vests the federal government with a proprietary interest in the OCS * * * ." *EP Operating Ltd. P'ship* v. *Placid Oil Co.*, 26 F.3d 563, 566 (5th Cir. 1994) (citation omitted). Increasing the costs and potential liability of offshore production activity could deprive the federal government of significant revenue, not only lowering the government's annual royalties from existing leases, but also deterring operators from bidding on new leases and slowing development on the OCS overall.[21]

---

[20] In Fiscal Year 2017, for example, offshore production in the Gulf of Mexico alone provided the federal government with more than $3 billion in revenue. U.S. Dep't of the Interior, *Natural Resources Revenue Data: Gulf of Mexico* (last visited Feb. 13, 2019), https://bit.ly/2ImnkYq.

[21] One recent study estimated that expanding oil and gas activity in the Eastern Gulf of Mexico alone could increase federal revenues from royalties, bonus bids, and rents by some $41.5 billion. See Calash LLC, *The Economic Impacts of Allowing Access to the Eastern Gulf of Mexico for Oil and Natural Gas Exploration and Development* at 5 (2018), https://bit.ly/2GAzRom; see also Draft Proposed Program at 6-15, https://bit.ly/2lU8cCV.

CONCLUSION

For the foregoing reasons, and those in Petitioner's brief, the Court should reverse the judgment of the Court of Appeals.

Respectfully submitted.

BALDWIN J. LEE
ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
Three Embarcadero Ctr. 12th Floor
San Francisco, CA 94111
(415) 273-7446

KEVIN W. BROOKS
VINSON & ELKINS LLP
2001 Ross Ave., Ste. 3900
Dallas, TX 75201
(214) 220-7805

JOHN P. ELWOOD
KEVIN A. GAYNOR
JEREMY C. MARWELL
Counsel of Record
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500W
Washington, DC 20037
(202) 639-6500
jmarwell@velaw.com

Counsel for Amici Curiae

GEORGE W. ABELE
PAUL HASTINGS LLP
515 South Flower St., 25th Floor
Los Angeles, CA 90071
(213) 683-6131

Counsel for Beta Operating Company, LLC and Amplify Energy Corp.

DAVID C. MCDERMOTT
DCOR, LLC
290 Maple Court, Suite 290
Ventura, CA 93003
(805) 535-2073

Counsel for DCOR, LLC

DAVID J. COOPER
CATHERINE E. BENNETT
VANESSA FRANCO CHAVEZ
KLEIN, DENATALE, GOLDNER, COOPER, ROSENLIEB & KIMBALL, LLP
4550 California Ave., 2nd Floor
Bakersfield, CA 93309
(661) 395-1000

Counsel for Ensign United States Drilling (California), Inc.

BARRY RUSSELL
INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
1201 15th Street, NW
Suite 300
Washington, DC 20005
(202) 857-4722

Counsel for Independent Petroleum Association of America

STACY R. LINDEN
MATTHEW A. HAYNIE
AMERICAN PETROLEUM INSTITUTE
1220 L St., NW
Washington, DC 20005
(202) 828-8000

Counsel for American Petroleum Institute

BENJAMIN G. SHATZ
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Blvd.
Los Angeles, CA 90064
(310) 312-4383

Counsel for California Independent Petroleum Association

EVAN H. ZIMMERMAN
OFFSHORE OPERATORS COMMITTEE
2400 Veterans Memorial Blvd., Suite 206
Kenner, LA 70062
(504) 904-7966

Counsel for the Offshore Operators Committee

PETER C. TOLSDORF
MANUFACTURERS' CENTER FOR LEGAL ACTION
733 10th St., NW
Ste. 700
Washington, DC 20001
(202) 637-3133

Counsel for National Association of Manufacturers

OYANGO A. SNELL
WESTERN STATES PETROLEUM ASSOCIATION
1415 L Street, Suite 900
Sacramento, CA 95814
(916) 325-3115

Counsel for Western States Petroleum Association

RANDALL LUTHI
NATIONAL OCEAN INDUSTRIES ASSOCIATION
1120 G Street, NW
Suite 900
Washington, DC 20005
(202) 347-6900

Counsel for the National Ocean Industries Association

FEBRUARY 2019

No. 18-389

IN THE

Supreme Court of the United States

PARKER DRILLING MANAGEMENT SERVICES, LTD.,

Petitioner,

v.

BRIAN NEWTON,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Date: February 27, 2019

QUESTION PRESENTED

Whether, under the Outer Continental Shelf Lands Act ("OCSLA"), state wage-and-hour law is both "applicable" to workers employed on Outer Continental Shelf structures and "not inconsistent" with existing federal law—and thus properly borrowed as the applicable federal law under 43 U.S.C. § 1333(a)(2)(A).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 9

I. CALIFORNIA WAGE-AND-HOUR LAW IS NOT INCORPORATED INTO FEDERAL LAW BECAUSE IT IS "INCONSISTENT" WITH THE FLSA 9

A. California Law Requires Compensation for Sleep and Rest Time that Is Not Compensable Under the FLSA 10

B. California's FLSA-Protected Right to Apply Its Wage-and-Hour Law Within Its Own Borders Is Irrelevant to Whether that Law Is "Inconsistent" with the FLSA 13

C. Congress Is Highly Unlikely to Have Intended a Statutory Scheme that Exposes Employers to Massive Retroactive Liability 16

Page

II. OCSLA DOES NOT INCORPORATE STATE LAW INTO FEDERAL LAW WHERE, AS HERE, THERE ARE NO GAPS IN FEDERAL LAW 20

A. The Decision Below Disregards This Court's OCSLA Case Law 22

B. The Decision Below Misconstrues Case Law Governing Federal Enclaves and Federal Civil Rights Law 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases:

American Economy Ins. Co. v. State of New York,
cert. denied, 138 S. Ct. 2601 (2018) 1
Burnett v. Grattan,
468 U.S. 42 (1984) 27, 28
Chevron Oil Co. v. Huson,
404 U.S. 97 (1971) 23, 24
Christopher v. SmithKline Beecham Corp.,
567 U.S. 142 (2012) 1
Continental Oil Co. v. London
S.S. Owners' Mut. Ins. Ass'n,
417 F.2d 1030 (5th Cir. 1969) 4, 16, 22
Deere & Co. v. New Hampshire,
cert. denied, 137 S. Ct. 38 (2016) 1
DelCostello v. Int'l Brotherhood of Teamsters,
462 U.S. 151 (1983) 17
Gulf Offshore Co. v. Mobil Oil Corp.,
453 U.S. 473 (1981) 24
Lewis v. United States,
523 U.S. 155 (1998) 8, 21, 25, 26
Mendiola v. CPS Sec. Sols., Inc.,
60 Cal. 4th 833 (2015) 7, 10, 11, 17, 19
Occidental Life Ins. Co. v. EEOC,
432 U.S. 355 (1977) 17
Pacific Merchant Shipping Ass'n v. Aubrey,
918 F.2d 1409 (9th Cir. 1990) 15
Robertson v. Wegmann,
436 U.S. 584 (1978) 27
Rodrigue v. Aetna Casualty and Surety Co.,
395 U.S. 352 (1969) 8, 21, 22, 23, 24
United States v. Butterworth
511 F.3d 71 (1st Cir. 2007) 12

Page(s)

United States v. Dennis,
625 F.2d 782 (8th Cir. 1980) 12
United States v. Kimbell Foods, Inc.,
440 U.S. 715 (1979) 7, 18, 19
United States v. Truman,
688 F.3d 129 (2d Cir. 2012) 12
United States v. Williams,
737 F.2d 594 (7th Cir. 1984) 12

Statutes and Regulations:

Assimilative Crimes Act (ACA),
18 U.S.C. § 13a 8, 21, 25, 26

Death on the High Seas Act (DOHSA),
46 U.S.C. § 761, *et seq.* 22, 23

Fair Labor Standards Act (FLSA),
29 U.S.C. § 203 ..... *passim*
29 U.S.C.§ 218(a) 4, 5, 6, 13, 14, 15, 18

The Longshoremen's and Harbor Workers' Compensation Act (LHWCA),
33 U.S.C. § 901 *et seq.* 18
33 U.S.C. § 902(3) 18

Outer Continental Shelf Lands Act (OCSLA),
43 U.S.C. §§ 1331-13356b ..... *passim*
43 U.S.C. § 1333(a)(1) 3, 7, 20, 23
43 U.S.C. § 1333(a)(2)(A) ..... *passim*
43 U.S.C. § 1333(a)(3) 15
43 U.S.C. § 1333(b) 18
43 U.S.C. § 1333(f) 18

Page(s)

42 U.S.C. § 1988(a) 9, 25, 27

Federal Rules of Evidence, Rule 801(d)(1)(A) 12

29 C.F.R. § 785.23 ..... 10, 28

Alaska Stat. Ann. § 23.20.095 (West) 19

8 AAC 15.105(a)-(b) 19

Private Attorney General Act of 2004 (PAGA), Calif. Labor Code § 2698, *et seq.* 3

Miscellaneous:

Louisiana Hours Worked, Employment Law Handbook, available at https://www.employmentlawhandbook.com/wage-and-hour-laws/state-wage-and-hour-laws/louisiana/hours-worked 19

Texas Workforce Comm'n, *Hours Worked for Non-Exempt Employees*, Texas Workforce Comm'n, available at https://twc.texas.gov/news/efte/hours_worked_nx_ees.html 20

Webster's New Collegiate Dictionary, G. & C. Merriam Co. (1981) 11

S. Rep. 411 (1953) 21

99 Cong. Rec. 232-36 21

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States.[1] WLF promotes and defends free enterprise, individual rights, a limited and accountable government, and the rule of law.

To that end, WLF has frequently appeared as *amicus curiae* in this and other federal courts to support continuity in legal doctrines and to ensure that settled expectations of parties are not lightly disregarded. *See, e.g., American Economy Ins. Co. v. State of New York, cert. denied*, 138 S. Ct. 2601 (2018); *Deere & Co. v. New Hampshire, cert. denied*, 137 S. Ct. 38 (2016); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012). WLF filed briefs in this matter in support of the petition for rehearing *en banc* in the Ninth Circuit and in support of the certiorari petition.

WLF is concerned that the Ninth Circuit's decision has disrupted settled expectations of employers by rejecting the well-accepted judicial understanding of the meaning of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-13356b. The decision exposes those employers to massive retroactive liability for damages and penalties, for having acted in reasonable reliance on that judicial understanding.

WLF agrees with Petitioner Parker Drilling

---

[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

Management Services, Inc. that OCSLA does not incorporate California labor law into the federal law that governs wage-and-hour issues arising from employment on oil platforms located on the Outer Continental Shelf (OCS). OCSLA does not render that California law "applicable" to the OCS because incorporation of that law into federal law—which exclusively governs structures on the OCS—is unwarranted in the absence of a gap in existing federal law. WLF writes separately to focus primarily on another reason why incorporation is unwarranted: California law is "inconsistent" with existing federal law. The clearest evidence of that inconsistency: as a result of the Ninth Circuit's decision incorporating California wage-and-hour law into federal law, Petitioner faces the threat of massive retroactive liability, despite having complied fully with wage-and-hour standards established by the federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 203.

STATEMENT OF THE CASE

Respondent Brian Newton was employed by Parker Drilling for two years on an oil platform on the OCS off the California coast, where his typical work day lasted 12 hours. The inaccessibility of the oil platform made it difficult for Newton to return to his home in California during his off hours, and thus he generally remained on the site for 14 days at a time. During Newton's 12 "off" hours, Parker Drilling provided Newton with food, lodging, and recreational facilities on the oil platform at no cost. As the Ninth Circuit recognized, Parker Drilling paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime

hours." Pet. App-20.

A month after Newton ceased working on the oil platform, he filed a putative class action alleging that Parker Drilling failed to pay him and similarly situated employees in accordance with California labor law. His principal claim is that California law required that he be paid for all hours that he was on the oil platform, even during sleep and rest time. He seeks to recover back pay plus civil penalties under California's Private Attorney General Act of 2004 (PAGA).

OCSLA states that fixed structures (such as drilling platforms) attached to the seabed on the OCS are deemed federal enclaves that are subject to federal law. 43 U.S.C. § 1333(a)(1). It further states that the laws of adjacent States "are declared to be the law of the United States" for those fixed structures "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). The district court held that California wage-and-hour laws were not "applicable"—because federal law already incorporates a comprehensive statutory scheme governing wage-and-hour claims (the FLSA) and thus has no need to borrow state wage-and-hour law to fill gaps in federal law—and dismissed the complaint. Pet. App-46 to App-60.

The Ninth Circuit reversed. Pet. App-1 to App-41. It held that state law is "applicable" to a controversy arising on an OCS oil platform whenever (as here) the law is "relevant" to the controversy, and it rejected "the notion that state laws have to fill a gap in federal law to qualify as surrogate federal law." *Id.* at App-21. In doing so, it explicitly disagreed with the

Fifth Circuit's holding in *Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030, 1036 (5th Cir. 1969), that state law cannot qualify as "applicable" under § 1333(a)(2)(A) unless it fills "a significant void or gap" in federal law. *Id.* at App-2.

The appeals court recognized that that the FLSA provides a comprehensive federal statutory scheme governing wage-and-hour issues, and that California law "embraces a more protective standard for determining hours worked" than the standard adopted by the FLSA. Pet. App-39. But the court denied that the differing standards rendered California law "inconsistent" with federal law within the meaning of OCSLA. *Ibid.* The Court held that in adopting OCSLA, Congress "provided for the wholesale assimilation of state civil law into federal law" governing the OCS, *id.* at App-32. It stated that California law is not "inconsistent" with the FLSA because the "savings clause in the FLSA reflects Congress's express intent that states should be allowed to adopt more protective standards." *Id.* at App-39 (citing 29 U.S.C. § 218(a).

SUMMARY OF ARGUMENT

In adopting the FLSA, Congress established a comprehensive set of wage-and-hour rules governing employment throughout the United States. It is uncontested that those rules apply to the work performed by Newton for Parker Drilling. The Ninth Circuit held that federal law also applies a second set of wage-and-hour rules to that work: rules established by California and allegedly incorporated into federal law by OCSLA.

That holding is contrary to OCSLA's plain statutory text. OCSLA states that federal law incorporates state laws into the federal law that governs fixed structures on the OCS only "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). The Ninth Circuit conceded that "California embraces a more protective standard for determining hours worked" than do the FLSA and implementing regulations. Pet. App-39. Under that "more protective standard," Newton (were he employed to perform work *in California*) would be entitled to wage payments for sleep and rest time he was required to spend on his employer's premises.

In contrast, the FLSA and implementing regulations make clear that federal wage-and-hour law does *not* require employers to pay employees for sleep and rest hours simply because employees are unable to return home between shifts. Those two standards are "inconsistent" with one another under any commonly understood definition of that word. A standard under which OCS employers would owe millions of dollars more than the wages payable under FLSA standards is "inconsistent" with those standards. As such, § 1333(a)(2)(A) makes clear that OCSLA does not incorporate the California standard into federal law—the only law that is applicable on the OCS.

In straining to avoid OCSLA's "not inconsistent" mandate, the Ninth Circuit pointed to 29 U.S.C. 218(a) (referred to by the court as the FLSA's "savings clause"), which states that no provision of the FLSA "shall excuse noncompliance with" any state law

"establishing a minimum wage higher than the minimum wage establish by this chapter or a maximum work week lower than the maximum workweek established by this chapter." But by its terms, § 218(a) becomes relevant only after it is determined that an employer is subject to (and noncompliant with) the state law at issue. And by virtue of the inconsistency between the California and FLSA standards governing sleep and rest time, OCSLA dictates that OCS employers are *not* subject to the California standard.

Section 218(a) comes into play only within areas subject to a State's traditional police powers. That provision reflects Congress's determination, based on federalism concerns, that a State is entitled to provide protections to those employed within the State that are greater than the protections otherwise afforded under federal law. But States have never been understood to be authorized to extend their wage-and-hour rules to areas (such as the OCS) outside their geographic borders. Rather, state law extends to areas under the federal government's exclusive control only to the extent that Congress has mandated the incorporation of state law, and § 1333(a)(2)(A)'s "not inconsistent" provision makes clear that Congress has not incorporated California's unique wage-and-hours rules into federal law governing the OCS.

The threat of massive retroactive liability for unpaid wages faced by Parker Drilling and other OCS employers is perhaps the clearest indication that California's wage-and-hour rules are "inconsistent" with OCSLA and other federal laws and thus inapplicable on the OCS. Until California announced

its rules four years ago in *Mendiola v. CPS Security Solutions, Inc.*, 60 Cal. 4th 833 (2015), employers and employees negotiated OCS wage agreements with the understanding that sleep and rest time spent on OCS structures was not compensable under applicable federal law. It is highly unlikely that Congress, when it adopted OCSLA, intended to authorized state courts to retroactively impose a contrary regime by announcing new state standards which would immediately be incorporated into federal law.

Such congressional intent is particularly unlikely when, as here, it exposes employers to massive retroactive liability. Indeed, this Court has taken such considerations into account in determining the extent to which state law should be incorporated into the governing federal law. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 739-40 (1979) (a "prudent[ial]" consideration in determining whether to incorporate state law is a hesitancy to adopt rules that would "undermine the] stability" of commercial law "essential for reliable evaluation of the risks involved" in structuring financial transactions).

The Ninth Circuit's misinterpretation of OCSLA is also evident from the statute's structure and history. Both of those indicia of congressional intent make clear that Congress intended § 1333(a)(2)(A) to serve a gap-filling function: the statute incorporated state law into federal law to the extent necessary to eliminate gaps that might exist in federal law applicable to structures on the OCS. The statute states that federal law is to apply to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. § 1333(a)(1). And it is

uncontested that the federal statute that specifies the criminal law applicable to such federal enclaves, the Assimilative Crimes Act (ACA), 18 U.S.C. § 13a, is intended as a gap-filling statute. *Lewis v. United States*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves."). There is no gap in federal law governing wage-and-hour issues arising on the OCS; the FLSA and implementing regulations provide a comprehensive set of rules governing those issues. Accordingly, OCSLA does not incorporate state laws that provide a competing set of rules.

The Ninth Circuit's contrary holding disregards this Court's entire body of OCSLA case law. The Court has repeatedly described § 1333(a)(2)(A) as serving a gap-filling function. *See, e.g., Rodrigue v. Aetna Cas. & Surety Co.*, 395 U.S. 352, 357 (1969) ("Since federal law, because of its limited function in a federal system, might be inadequate to cope with the full range of potential legal problems, [OCSLA] supplemented gaps in the federal law with state law through the 'adoption of State law as the law of the United States.'"). At issue in *Rodrigue* were wrongful-death actions filed by the survivors of individuals killed while working on OCS drilling rigs. The Court stated that if federal law provided a cause of action, it would be "exclusive" and would "oust" any competing state-law cause of action. 395 U.S. at 359. Only after finding that federal law did not provide a cause of action did the Court conclude that OCSLA incorporated Louisiana wrongful-death law as part of federal law. *Id.* at 365-66.

The Ninth Circuit sought to support its holding

by reference to case law arising under the ACA and 42 U.S.C. § 1988(a), a federal civil rights statute. Pet. App-29 to App-35. The appeals court misconstrued that case law. Indeed, because both the ACA and § 1988(a) are universally understood as authorizing incorporation of state law into federal law solely for the purpose of filling gaps in federal law, those statutes cannot plausibly be understood as support for the Ninth Circuit's contrary interpretation of OCSLA.

ARGUMENT

I. CALIFORNIA WAGE-AND-HOUR LAW IS NOT INCORPORATED INTO FEDERAL LAW BECAUSE IT IS "INCONSISTENT" WITH THE FLSA

The OCS surrounding the United States is within the exclusive control of the United States government. While States may exercise territorial jurisdiction over submerged lands immediately adjacent to their coasts, federal law dating from the 1940s definitively established that submerged lands more than three nautical miles off the coast (the OCS) are (and always have been) within the exclusive jurisdiction of the federal government and subject exclusively to federal law.

Newton does not contend otherwise. He bases his California wage-and-hour claim not on an assertion that California law is directly applicable to the OCS off the coast of California, but on an assertion that Congress incorporated that law into federal law when it adopted OCSLA in 1953. But Congress carefully limited the extent to which it incorporated state law into the federal law governing the OCS. OCSLA

incorporates state laws only "[t]o the extent that they are applicable and not inconsistent with [OCSLA] or with other Federal laws." 43 U.S.C. § 1333(a)(2)(A). Because California wage-and-hour law is "inconsistent" with federal wage-and-hour law, it is not part of the federal law upon which Newton may rely.

A. California Law Requires Compensation for Sleep and Rest Time that Is Not Compensable Under the FLSA

In adopting the FLSA, Congress established a comprehensive set of wage-and-hour rules governing employment throughout the United States, including on the OCS. Regulations issued by the Department of Labor pursuant to the FLSA are directly applicable to Newton, who generally remained on his OCS rig for 14 days at a time and worked 12-hour shifts each day. Those regulations state that an employee who remains on company premises "for extended periods of time" is "not considered as working" while "engaged in normal private pursuits" such as "eating, sleeping, [and] entertaining." 29 C.F.R. § 785.23. Parker Drilling complied fully with the FLSA; it paid Newton "an hourly rate well above the state and federal minimum wage, and also paid him premium rates for overtime hours." Pet. App-20. It did not pay him for his sleep and rest time.

Before 2015, Parker Drilling seemingly was in full compliance with California wage-and-hour law as well, even if that law had been applicable on the OCS. But in its 2015 *Mendiola* decision, the California Supreme Court announced that California wage-and-

hour law, in sharp contrast to federal law, generally requires that employees be paid for all hours they remain on their work site, even during sleeping and resting time. *Mendiola*, 60 Cal. 4th at 848. The Ninth Circuit fully recognized the contrast between the federal and California wage-and-hour standards, stating that *Mendiola* "establishes that California embraces a more protective standard for determining hours worked" than does federal law. Pet. App-39.

Under any commonly understood definition of the term "inconsistent," the California wage-and-hour standard for sleep and rest time is not consistent with the federal standard. *See, e.g., Webster's New Collegiate Dictionary*, G. & C. Merriam Co. (1981) (defining "consistent" as "marked by harmonious regularity or steady continuity: free from irregularity, variation, or contradiction," and "showing steady conformity to character, profession, belief, or custom"). The two wage-and-hour standards cannot plausibly be deemed "free from irregularity, variation, or contradiction." California's "more protective standard" likely would require Parker Drilling to pay Newton for 24 work hours each day he remained on the OCS; the FLSA clearly does not. A standard under which OCS employers would owe millions of dollars more than the wages payable under FLSA standards is not "marked by harmonious regularity" with the FLSA standards.

The Ninth Circuit sought to apply a far more constricted definition of "inconsistent" even as it recognized that "California embraces a more protective standard for determining hours worked." Pet. App-39. Yet it pointed to no other federal statutes in which Congress has adopted the narrow definition of

"inconsistent" that the appeals court ascribed to § 1333(a)(2)(A).

In every instance of which WLF is aware, Congress has intended the ordinary meaning of "inconsistent" when it has used that word in a federal statute. For example, in the Federal Rules of Evidence, Congress has excluded from the definition of hearsay a prior statement that "is inconsistent with the declarant's testimony [at trial] and was given under penalty of perjury." FRE Rule 801(d)(1)(A). Federal courts have repeatedly rejected efforts to narrowly define what constitutes an "inconsistent" prior statement. *See, e.g.*, *United States v. Williams*, 737 F.2d 594, 608 (7th Cir. 1984) ("[W]e do not read the word 'inconsistent' in Rule 801((d)(1)(A) to include only statements diametrically opposed or logically incompatible."); *United States v. Butterworth*, 511 F.3d 71, 75 (1st Cir. 2007) (statement describing an event is inconsistent with later testimony that the witness lacks current memory of the event); *United States v. Truman*, 688 F.3d 129, 142 (2d Cir. 2012) (witness's refusal to answer a question at trial is "inconsistent with his prior testimony" in which he answered the question); *United States v. Dennis*, 625 F.2d 782, 795 (8th Cir. 1980) ("[I]nconsistency is not limited to diametrically opposed answers but may be found in evasive answers, inability to recall, silence, or changes of position.").

The Ninth Circuit concedes that the California wage-and-hour standard is not the same as the federal wage-and-hour standard and leads to disparate outcomes in this very case. As such, § 1333(a)(2)(A) makes clear that OCSLA does not incorporate the

California standard into federal law—the only law that is applicable on the OCS.

B. California's FLSA-Protected Right to Apply Its Wage-and-Hour Law Within Its Own Borders Is Irrelevant to Whether that Law Is "Inconsistent" with the FLSA

To support its holding that California's "more protective standard" is "not inconsistent" with the federal wage-and-hour standard, the Ninth Circuit pointed to the following provision of the FLSA:

> No provision of this chapter or of any other thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum work week lower than the maximum workweek established under this chapter.

29 U.S.C. § 218(a). According to the Ninth Circuit, this FLSA "savings clause" "explicitly permits more protective state wage and hour laws." Pet. App-36. For that reason, the court "reject[ed] Parker's suggestion that California's minimum wage and overtime laws are antagonistic" to the FLSA "simply because they establish different and more generous benchmarks." Pet. App-36 to App-37.

WLF notes initially that OCSLA refers to "inconsistent" standards, not "antagonistic" ones. More

importantly, the Ninth Circuit argument is unavailing because § 218(a) simply has no application to this case.

Section 218(a) states that compliance with FLSA wage-and-hour standards does not excuse "noncompliance" with a state law establishing a standard more generous to employees. But an employer cannot be deemed "noncomplian[t]" with a state standard that does not apply to the employer. No one argues, for example, that wage-and-hour standards established by New York or New Jersey apply to Parker Drilling, so it is irrelevant whether it complies with those standards. It is similarly irrelevant whether Parker Drilling is "noncomplian[t]" with California wage-and-hour laws for its activities on the OCS (a geographic area over which California exercises no more jurisdiction than do New York and New Jersey), unless it is first determined that OCSLA incorporates those standards into federal law pursuant to 43 U.S.C. § 1333(a)(2)(A). Because (as demonstrated above) incorporation of the "inconsistent" California wage-and-hour standard is not sanctioned by OCSLA, § 218(a) is inapplicable; there is no relevant state law with which Parker Drilling could be in "noncompliance." Parker Drilling does not contend that its compliance with the FLSA standard should excuse it from having to comply with applicable state wage-and-hour law (the contention rejected by § 218(a)); rather, it contends that there is no applicable state law.

Section 218(a) comes into play only within areas subject to a State's traditional police powers. That provision reflects Congress's determination, based on federalism concerns, that a State is entitled to provide

protections to those employed within the State that are greater than the protections otherwise afforded under federal law. Indeed, case law relied on by the court below supports that limited understanding of § 218(a). *See, e.g., Pacific Merchant Shipping Ass'n v. Aubrey*, 918 F.2d 1409, 1421 (9th Cir. 1990) (Congress adopted § 218(a) "to make clear its intent not to disturb the traditional exercise of the states' police powers with respect to wages and hours more generous than the federal standards"). That purpose has no relevance to work performed on the OCS, where California never has, and does not now, exercise its police powers.

To underscore the absence of state police powers over the OCS, Congress included the following provision in the OCSLA:

> The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose ...

43 U.S.C. § 1333(a)(3). Applying to the OCS a state wage-and-hour standard that is "inconsistent" with the standard adopted under federal law contravenes the express provisions of OCSLA. Nothing in the FLSA (which was adopted several decades before OCSLA) suggests that Congress adopted § 218(a) for the purpose of overriding OCSLA and applying two divergent wage-and-hour standards to an area solely within the jurisdiction of the federal government.

C. Congress Is Highly Unlikely to Have Intended a Statutory Scheme that Exposes Employers to Massive Retroactive Liability

Prior to the decision below, a body of federal case law had uniformly rejected incorporation of state law in OCSLA cases in which federal law (in this case, the FLSA) provides a comprehensive set of rules. *See, e.g., Continental Oil Co. v. London S.S. Owners' Mut. Ins. Ass'n*, 417 F.2d 1030 (5th Cir. 1969). Not surprisingly, oil companies responded to that case law by adopting OCS employment practices that complied with federal wage-and-hour standards. Yet unless the decision below is overturned, they face massive retroactive liability under state wage-and-hour standards that prior federal-court OCSLA decisions had deemed inapplicable to the OCS.[2]

The threat of massive liability is a strong indication that California's wage-and-hour rules are "inconsistent" with federal law and thus inapplicable on the OCS. When OCSLA was adopted in 1953, the FLSA had already put into place a comprehensive federal regulatory scheme governing wage-and-hour issues. It is highly unlikely that when it adopted OCSLA, Congress intended to permit States at their option to impose competing sets of wage-and-hour standards on an area (the OCS) over which they

---

[2] Indeed, the Ninth Circuit conceded that, prior to its decision, *every* federal district court in California (including the district court in this case) had relied on *Continental Oil* to reject efforts to apply California wage-and-hour law to the OCS. Pet. App-20 n.13.

exercise no jurisdiction—and thereby expose employers to retroactive liability for failing to anticipate the State's move. It is far more likely that Congress limited state-law incorporation to law "not inconsistent" with federal law precisely because it sought to prevent liability-inducing changes in OCS regulation of the sort initiated by *Mendiola* and the decision below.[3] Indeed, Congress had no need to "borrow" state law at all when, as with wage-and-hour standards, a comprehensive body of federal law already existed; doing so merely invites the confusion and legal instability that frequently arises whenever entities are subject to two non-identical regulatory schemes.

The liability risks created by the decision below are not limited to back-pay awards covering sleep and rest time. As Parker Drilling notes, the California minimum hourly wage is significantly higher than the federal minimum wage. Although Parker Drilling's OCS employees are all paid in excess of the California minimum wage, the decision below may pose

---

[3] As Petitioner notes, the decision below enables a State bent on discouraging off-shore oil-and-gas development to undermine development by imposing new regulations and creating the potential for massive civil liability. This Court has cautioned that "it is the duty of the federal courts to assure that the importation of state law [into federal law] will not frustrate or interfere with the implementation of national policies." *DelCostello v. Int'l Brotherhood of Teamsters*, 462 U.S. 151, 161 (1983) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977)). Congress adopted OCSLA because it determined that the Outer Continental Shelf should be subject to *exclusive* federal control and that it should be up to the federal government to determine the extent to which natural resources under the OCS should be exploited.

retroactive liability concerns for other OCS employers who, in good-faith reliance on prior case law, have paid hourly wages that comply with federal law but not state law. Other risks include liability under California workers' compensation law. The universal understanding of OCS employers is that they are not subject to workers' compensation laws. But the decision below calls that understanding into doubt.[4]

When determining the extent to which state law should be incorporated into federal law, the Court has been mindful of the need to avoid such instability. For example, in *Kimbell Foods*, the Court faced the need to establish a federal rule governing federal-government lien priority. The Government sought creation of a federal common-law rule that would grant its liens securing loan guarantees priority over all private liens. The Court rejected that approach (at least with respect to non-tax liens) and instead directed lower courts to

---

[4] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.*, provides a right of action (against an employer) for employees injured while engaged in maritime employment. Although employees working on OCS drilling platforms are not engaged in "maritime employment" (33 U.S.C. § 902(3)), Congress expanded the LHWCA to expressly cover OCS drilling-platform employees when it adopted OCSLA. 43 U.S.C. § 1333(b). Because injured OCS employees may seek compensation under the LHWCA, there is no need to incorporate additional state-law remedies (*e.g.*, workers' compensation) into the federal law governing the OCS. However, OCSLA includes a "savings clause" similar to 29 U.S.C. § 218(a). *See* 43 U.S.C. § 1333(f) (the creation of a LHWCA remedy for OCS employees is "not intended" to bar otherwise applicable rights). The decision below may open the door to claims that California workers' compensation law is available to OCS employees, based on claims that it is both "applicable" and "not inconsistent" with federal law.

incorporate into federal law the lien-priority law of the forum state. *Kimbell Foods*, 440 U.S. at 739-40. The Court explained that it was adopting this "prudential course" in order to avoid the upheaval potentially caused by "altering settled commercial practices":

> In structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved. Cf. *National Bank v. Whitney*, 103 U.S. 99 (1881). However, subjecting federal contractual liens to the doctrines developed in the tax lien area could undermine that stability. Creditors who justifiably rely on state law to obtain superior liens would have their expectations thwarted whenever a federal contractual security interest suddenly appeared and took precedence.

Ibid.

The Court should be similarly reluctant in this case to fashion a federal law that undermines the reasonable expectations of OCS employers and exposes them to massive liability. Until *Mendiola*, none of the States adjacent to offshore drilling platforms had adopted wage-and-hour standards governing sleep and rest time that differed from FLSA standards, and that continues to be true for each of the States other than California. *See, e.g.*, Alaska Stat. Ann. § 23.20.095 (West) & 8 AAC 15.105(a)-(b) (Alaska law); *Louisiana Hours Worked*, Employment Law Handbook, available at https://www.employmentlawhandbook.com/wage-

and-hour-laws/state-wage-and-hour-laws/louisiana/hours-worked (Louisiana law); *Hours Worked for Non-Exempt Employees*, Texas Workforce Comm'n, available at https://twc.texas.gov/news/efte/hours_worked_nx_ees.html (Texas law). Parker Drilling acted in reasonable reliance on that regulatory history in negotiating employment relationships, and no one contests that at all times it has complied with the FLSA. Yet if the decision below is upheld, Parker Drilling's reasonable expectations will have been thwarted, and it will face massive liability claims. WLF respectfully submits that the possibility of retroactive liability could not exist if California's wage-and-hour standard were "not inconsistent" with the FLSA.

II. OCSLA Does Not Incorporate State Law into Federal Law Where, as Here, There Are No Gaps in Federal Law

The Ninth Circuit's misinterpretation of OCSLA is also evident from the statute's structure and history. As Parker Drilling's brief explains in detail, numerous provisions included in OCSLA make clear that Congress intended § 1333(a)(2)(A) to serve only a gap-filling function; that is, the statute incorporates state law into federal law to the extent necessary to eliminate gaps that might exist in federal law applicable to structures on the OCS.

Rather than repeating that explanation here, WLF focuses on just one of those provisions. Section 1333(a)(1) states that federal law is to apply to the OCS "to the same extent as if the [OCS] were an area of exclusive Federal jurisdiction located within a State."

Federal law has long provided that areas of exclusive federal jurisdiction located within a State (generally referred to as "federal enclaves") are subject solely to federal law but that the law of the surrounding State should be incorporated into federal law where necessary to eliminate gaps in the law.[5] So by specifying that the OCS should be treated akin to federal enclaves, OCSLA makes clear that state law should be applied to the OCS only for gap-filling purposes. That rationale precludes incorporation of California wage-and-hours standards into federal law, because there are no gaps in the FLSA's comprehensive wage-and-hours standard.

OCSLA's legislative history confirms the gap-filling function that Congress intended for § 1333(a)(2)(A). *Rodrigue* summarizes that legislative history, including: (1) a Senate committee report stating that OCSLA adopts state law as federal law, to be used "when Federal statutes or regulations ... are inapplicable"; and (2) opponents of OCSLA, who "realized full well that state law was being used only to supplement federal law," introduced an ultimately unsuccessful amendment to make state law fully applicable on the OCS. 395 U.S. at 358-59 (citing S. Rep. 411 (1953); and 99 Cong. Rec. 7232-36).

---

[5] For example, the Assimilative Crimes Act is the federal law that governs the incorporation of state criminal law into the federal law applicable to federal enclaves. The ACA provides that state law is to be incorporated solely for the purpose of filling gaps in federal law. *Lewis*, 523 U.S. 155, 160 (1998) ("The ACA's basic purpose is one of borrowing state law to fill gaps in the federal criminal law that applies on federal enclaves.").

A. The Decision Below Disregards This Court's OCSLA Case Law

The Ninth Circuit's rejection of a gap-filling interpretation of OCSLA disregards *Rodrigue* and the Court's entire body of OCSLA case law. *Rodrigue* repeatedly describes OCSLA as a statute intended to fill gaps in federal law. Indeed, the Fifth Circuit observed that limiting application of state law to instances in which its application is "necess[ary] to fill a significant void or gap" is "the recurring theme of *Rodrigue*." *Continental Oil*, 417 F.2d at 1036. *See also Rodrigue*, 395 U.S. at 362 (stating that "the whole body of Federal law was made applicable to the [OCS] (as well as state law *where necessary*)") (emphasis added).

At issue in *Rodrigue* were wrongful-death actions filed by the survivors of individuals killed while working on OCS drilling rigs. The plaintiffs filed claims under Louisiana tort law, but the defendants argued that OCSLA did not incorporate Louisiana tort law because the plaintiffs had an adequate remedy under the Death on the High Seas Act (DOHSA), 46 U.S.C. § 761 *et seq.* Crucially, the Court agreed fully with the defendants' gap filling premise; it stated that: (1) the DOHSA remedy "would be exclusive if it applied"; and (2) "for federal law to oust adopted state law federal law must first apply." *Id.* at 359. The Court ultimately permitted the plaintiffs to proceed with their state-law tort claims, but only after concluding that DOHSA did not provide a remedy. *Id.*

at 359-66.[6]

In light of *Rodrigue*'s ultimate holding that the plaintiffs' state-law claims were incorporated into federal law by OCSLA, the Court's statements regarding gap-filling (that the state-law claims were actionable *only* because the plaintiff lacked a federal cause of action under DOHSA) were arguably dicta. But those statements were central to the Court's rationale, so the Ninth Circuit was unwarranted in asserting that *Rodrigue* established nothing more than that "absent a maritime nexus, federal admiralty law does not extend to the OCS." Pet. App-27.

The Court's gap-filling view of OCSLA carried over to its later OCSLA decisions. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court described its *Rodrigue* decision as follows:

> In *Rodrigue*, we clarified the scope of application of federal law and state law under § 1331(a)(1) and § 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognized that there exists a substantial "gap" in federal law. Thus, state law remedies are not "inconsistent" with applicable federal law.

---

[6] The Court held that Congress determined that admiralty law should *not* apply on OCS structures and that DOHSA may only be invoked in an admiralty action. *Ibid.* The Court noted that admiralty law usually applies to claims involving vessels and that Congress did not wish to classify structures on the OCS as vessels. *Id.* at 360-62.

> Accordingly, we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333(a)(2).

404 U.S. at 101. The clear implication of *Huson*: where (as in Newton's case) there is no gap in federal law, state law is not incorporated into federal law by OCSLA. The Court later reinforced its point by stating, "Congress [in OCSLA] specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. ... Thus, Congress made clear provision *for filling in the gaps* in federal law." *Id.* at 104 (emphasis added).

Similarly, in a later OCSLA decision, the Court observed, "All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial 'gaps' in the coverage of federal law, OCSLA borrows the 'applicable and not inconsistent' laws of the adjacent States as surrogate federal law." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 480 (1981) (quoting 43 U.S.C. § 1333(a)(2)). The Ninth Circuit is correct that neither *Rodrigue* nor *Huson* nor *Gulf Offshore* addressed the precise question presented here: does OCSLA incorporate state law when a comprehensive federal regulatory scheme addresses the very same subject matter and thus there are no gaps in federal law? But the tenor of those decisions—including repeated statements that state law is incorporated only if there is a gap in federal law—strongly supports Parker Drilling.

B. The Decision Below Misconstrues Case Law Governing Federal Enclaves and Federal Civil Rights Law

The Ninth Circuit sought to support its holding by reference to case law arising under the ACA and 42 U.S.C. § 1988(a), a federal civil rights statute. Pet. App-29 to App-35. The appeals court misconstrued that case law. Indeed, because both the ACA and § 1988(a) are universally understood as authorizing incorporation of state law into federal law solely for the purpose of filling gaps in federal law, those statutes cannot plausibly be understood as support for the Ninth Circuit's contrary interpretation of OCSLA.

The Ninth Circuit's reliance on *Lewis* was particularly misplaced. *Lewis* addressed the circumstances under which the ACA mandates that state law should be incorporated into the federal law that governs federal enclaves. The defendant was charged with murdering her child on a federal enclave. Prosecutors sought to incorporate Louisiana law, which would have allowed them to charge the defendant with murdering a child under 12 (classified as first-degree murder by Louisiana). The Court *rejected* that incorporation effort, with the result that the defendant could only be charged with second-degree murder under existing federal law. *Lewis*, 523 U.S. at 172. The Court explained that there was "no gap for Louisiana's statute to fill" because federal law already criminalize "all variants of murder." *Id.* at 169. Congress had simply decided that the type of murder with which the defendant was charged should not be classified as first-degree murder (and thus could not be

punishable by death). *Id.* at 170.

WLF recognizes that while OCSLA and the ACA have many similarities–both involve incorporation of state law into federal law, and Congress explicitly modeled OCSLA after statutes (such as the ACA) that govern federal enclaves located within a State—differences in the statutes make it difficult to draw relevant conclusions about OCSLA from ACA case law. But to the extent that *Lewis* has any relevance here, it supports Parker Drilling, not (as the Ninth Circuit insisted) Newton. *Lewis* demonstrates that, in general, federal law does not incorporate state law unless the state law is needed to fill a gap in federal law.

The Ninth Circuit drew from *Lewis* the proposition that charging a defendant with a state crime is not automatically precluded simply because the defendant's conduct violated *some* federal crime, no matter how minor. Pet. App-30. But that proposition provides the Ninth Circuit with very little traction. As an example of a situation in which prosecutors could turn to gap-filling state law despite the availability of a federal crime, *Lewis* posited a situation in which there was no federal law against murder but the defendant could be charged under federal law with simple assault. 523 U.S. at 161. One could plausibly argue, based on *Lewis*, that OCSLA's gap-filling limitations should not prevent invocation of state law in OCS cases where the only federal remedy is grossly inadequate. But that argument is irrelevant here, where federal law provides comprehensive standards governing wage-and-hour issues.

The Ninth Circuit's reliance on case law

interpreting 42 U.S.C. § 1988(a) is equally implausible. That statute provides in pertinent part:

> [I]n all cases where [laws enacted for the protection of civil rights] are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is *not inconsistent* with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of the cause.

(Emphasis added.)

Far from supporting the Ninth Circuit, § 1988(a) case law cited by the appeals court interprets the statute precisely in the manner that Parker Drilling urges for OCSLA—state law is incorporated into federal law under § 1988(a) only if: (1) incorporation is necessary to fill a gap in federal law; *and* (2) the state law is not inconsistent with federal law. *See, e.g., Burnett v. Grattan*, 468 U.S. 42 (1984); *Robertson v. Wegmann*, 436 U.S. 584 (1978). In both cases, all parties agreed that a gap existed in federal law, and the only issue before the Court was whether the gap-

filling state law was inconsistent with federal law.[7] Unlike here, in neither case could the party opposing incorporation point to a written federal standard with which the state law was arguably inconsistent. As a result, the Court's inconsistency analysis included an examination of policies underlying federal civil rights laws. *See, e.g., Burnett*, 468 U.S. 52-55. The Ninth Circuit cited *Burnett* in support of its contention that whether California wage-and-hour standards are "inconsistent" with federal wage-and-hour standards should include an examination of Congress's objectives. Pet. App-35. But *Burnett* includes no suggestion that where, as here (and unlike in *Burnett*), the inconsistency between a federal regulation (29 C.F.R. § 785.23) and state law is readily apparent, a court is permitted to rely on policy considerations as a basis for ignoring the inconsistency.

---

[7] Indeed, in *Burnett* no party objected to importation of state law; the only issue before the court was which of two state limitations statutes should be imported into federal law.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

Richard A. Samp
(Counsel of Record)
Marc B. Robertson
Washington Legal
Foundation
2009 Mass. Ave., NW
Washington, DC 20036
(202) 588-0302
rsamp@wlf.org

Dated: February 27, 2018